Summary of Employment Requirements for California Growers

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Disclaimer

While every effort has been made to ensure the information contained in this booklet is accurate, laws, as well as policies and procedures, are subject to change. Therefore, you need to keep up-to-date on developments. You should also consider contacting Farm Employers Labor Service for help with employment-related questions. Also, you should consult competent legal counsel when complicated questions arise.

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Introduction

This publication is designed to give agricultural employers in California a handy reference to the major employment laws and regulations reviewed by federal and state enforcement agencies during compliance inspections. Selected other requirements are also covered.

This publication, however, does not provide a comprehensive review of all laws and regulations affecting labor and employment. Issues such as employment discrimination, taxation, and agricultural labor relations, for example, are not addressed.

Internet access to employment-related information is available at these Web sites:

California Code of Regulations:	http://ccr.oal.ca.gov/
California Laws:	http://www.leginfo.ca.gov/ca
Employment Development Department:	http://www.edd.cahwnet.gov
Federal Register:	http://ocfo.ed.gov/fedreg.ht
Federal Code of Regulations:	http://www.access.gpo.gov
Cornell Law School Federal Laws Link:	http://www4.law.cornell.edu/
Bureau of Immigration & Customs Enforcement:	http://www.bice.immigration.
Federal Laws:	http://uscode.house.gov/usc

For a more complete review of the subjects addressed in this publication and for coverage of other labor and employment laws, consult the *Farm Labor Manual for California Farmers* published by Farm Employers Labor Service. The manual has 20 sections, each covering a specific subject such as wages and hours of work, child labor, health and safety, payroll and record keeping, and discrimination. The manual is available from FELS, 2300 River Plaza Drive, Sacramento, CA 95833-3293 (telephone: 800-753-9073).

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Cal/OSHA and Pesticides

Cal/OSHA Safety and Health Requirements

The California Occupational Safety and Health Act protects California employees from workplace hazards. The Act is enforced by the Division of Occupational Safety and Health within the Department of Industrial Relations.

Cal/OSHA Consultation Service: Cal/OSHA offers a consultation service that helps employers voluntarily comply with the extensive employee safety-and-health standards. Offered at no cost to employers, the Consultation Service can be of particular help to small employers without the resources to keep pace with those standards. The Consultation Service is separate from Cal/OSHA's Compliance Unit. At the employer's request a Cal/OSHA consultant will make an onsite visit and help the employer identify any existing violation. Cal/OSHA consultants do not cite employers for safety-and-health violations. Instead, they advise how to correct the condition. The consultant and employer try to agree to a reasonable abatement plan. However, if the employer refuses to abate an imminent hazard or serious violation, the Cal/OSHA Compliance Unit would be notified.

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Injury and Illness Reporting: An employer must file with the Division of Labor Statistics and Research or its workers' compensation insurer a report of every occupational injury or illness that results in lost-time beyond the date of injury or illness, or that requires medical treatment beyond first aid. This report must be filed within five days after the employer learns of the injury or illness. A death or serious injury or illness (requiring hospitalization for more than 24 hours other than for purposes of observation) must be reported to the Division of Occupational Safety and Health by telephone or telegraph within 8 hours after the employer knows or should have known of the death or illness.

Employers must also maintain in each establishment a log of all recordable occupational injuries and illnesses for that establishment.

Injury and Illness Prevention Program: Every employer in California must establish, implement and maintain an effective written injury and illness prevention program (IIPP) which must at a minimum provide for the following:

1. Identification of the person(s) with authority and responsibility for implementing the IIPP. GISO §3203á)(1).
2. A system for ensuring that employees comply with safe and healthy work practices. GISO §3203(a)(2).
3. A system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. GISO §3203(a)(3).
4. Procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. GISO §3203(a)(4).
5. A procedure to investigate occupational injury or occupational illness. GISO §3203(a)(5).
6. Methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard. GISO §3203(a)(6).
7. Training and instruction: (A) When the program is first established; (B) To all new employees; (C) To all employees given new job assignments for which training has not previously been received; (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and (F) For supervisors to familiarize them with the safety and health hazards to which employees under their immediate direction and control may be exposed. GISO §3203(a)(7).

Cal/OSHA Consultation Service has issued a series of model IIPPs. A model for intermittent employers, such as agricultural employers, is available on the Service's Internet Web site at: http://www.dir.ca.gov/DOSH/dosh_publications/iipintermitag.html

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Field Sanitation: Agricultural employers must provide toilet and handwashing facilities and drinking water

where one or more employees are performing hand-labor operations. “Agricultural employer” includes a person or entity that:

1. Owns or operates an agricultural establishment;
2. Buys a crop before it is produced and exercises substantial control over production (*e.g.*, a packinghouse); or
3. Recruits and supervises employees (*e.g.*, a farm labor contractor) or manages an agricultural establishment (*e.g.*, a grove or vineyard manager).

A farm labor contractor is generally liable for failing to provide field sanitation facilities to the farm labor contractor’s employees.

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Definitions: A "hand-labor operation" is one performed by hand or with a hand tool in producing an agricultural commodity. Some examples of "hand-labor operations" are: the moving of irrigation pipes and other irrigation equipment by hand; the hand-cultivation, hand-weeding, hand-planting and hand-harvesting of crops; and the hand-packing of produce into containers, whether done on the ground, on a moving machine, or in a temporary packing shed located in the field.

"Hand-labor operations" do not include logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures (*e.g.*, canning facilities or packing houses).

Alternative Compliance: An agricultural employer may meet the field sanitation facility requirements specified below by providing transportation to the facilities only where at least one of these three conditions applies:

1. Employees are performing field work for less than two hours (including transportation time to and from the field);
2. Fewer than five employees are engaged in hand-labor operations on any given day; or
3. Employees are not engaged in hand-labor operations.

Agricultural operations not involving hand-labor must comply with Title 8, Calif. Code of Regs., §§3360-3368 (sanitation facilities in permanent places of employment).

Drinking Water Requirements: Potable drinking water must be provided during working hours at locations readily accessible to all employees. Access to the water must always be permitted.

The water must be fresh, pure, cool, and in sufficient amounts to meet the needs of all employees.

Drinking water containers must be constructed of materials that maintain water quality. They must have a faucet, fountain, or other device to draw the water.

The water must be dispensed in single-use drinking cups or by fountains. "Common-use" (i.e., shared) cups or dippers are not permitted unless they are cleaned and sterilized between uses.

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Toilet and Handwashing Facilities: A fixed or portable facility which is designed to collect and contain the products of both defecation and urination must be provided. It must be supplied with toilet paper adequate to employee needs. It may be a biological, chemical, flush or combustion toilet or sanitary privy.

Separate toilet facilities for each sex must be provided for each 20 employees or fraction thereof. One handwashing facility must be provided for each 20 employees or fraction thereof. When fewer than five employees are working, separate toilet rooms for each sex are not required, as long as toilet rooms can be locked from the inside and contain at least one water closet.

Urinals may be installed instead of water closets in toilet rooms to be used only by men, as long as the

number of water closets is at least two-thirds the minimum number of toilet facilities.

Toilet and handwashing facilities must meet these standards:

1. Toilet facilities must be screened.
2. Toilet and handwashing facilities must be ventilated and have self-closing doors, lockable from the inside, and otherwise be constructed to ensure privacy.
3. Toilet facilities must have an area of at least 8 square feet, with a minimum width of 2½ feet for each toilet seat. A facility must have a minimum area of 10 square feet, with a minimum width of 2½ feet, when a urinal is included. Sufficient additional space must be included if handwashing facilities are within the facility.
4. The waste water tank on chemical toilets must be constructed of durable, easily-cleanable material and be able to hold at least 40 gallons. It must be constructed to prevent splashing on the occupant, field, or road.
5. The handwashing water tank must be able to hold at least 15 gallons.
6. Units housing toilet and handwashing facilities must be rigidly constructed. Their inside surfaces must be of nonabsorbent material, smooth, readily cleanable, and finished in a light color.
7. Water flush toilets and handwashing facilities must conform to Title 24, Calif. Code of Regs., Part 5, Calif. Plumbing Code.

Location: Toilet and handwashing facilities must be accessibly located near each other. They must be within a ¼-mile walk or five minutes of employees, whichever is less. Where due to terrain it is not feasible to locate facilities as required above, they must be located at the point closest to vehicular access.

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Maintenance Standards: The employer must service and maintain potable drinking water, toilet and handwashing facilities in accordance with appropriate public health sanitation practices, including the following:

Drinking water containers must be regularly cleaned, refilled daily or more often as necessary, and covered and protected to prevent persons from dipping the water by hand or otherwise contaminating it.

Toilet facilities must always be operational, clean, sanitary, and in good repair. Written records of service and maintenance must be kept for at least two years.

Toilet paper must be provided in a suitable holder in each toilet unit.

Effective odor control and solid-liquefying chemicals must be used in chemical toilet waste holding tanks.

Contents of chemical tanks must be disposed of by draining or pumping into a sanitary sewer, an approved septic tank of sufficient capacity to handle the wastes, a suitably sized and constructed holding tank approved by the local health department, or by any other method approved by the local health department.

Privies must be moved to a new site or taken out of service when the pit is filled to within 2 feet of the adjacent ground surface. The pit contents must be covered with at least 2 feet of well-compacted dirt when the privy is removed.

Handwashing facilities must meet these standards:

1. Pure, wholesome, and potable water must be available for handwashing.
2. Handwashing facilities must be refilled with potable water as necessary.
3. Soap or other suitable cleansing agent and single-use towels must be provided.
4. Signs stating that the water is only for handwashing must be posted.
5. Handwashing facilities must be provided at or near the toilet unit.
6. Handwashing facilities must be clean and sanitary.

Notice to Employees: The employer must notify each employee of the location of the sanitation facilities and potable water and allow each employee reasonable opportunities during the workday to use them. The

employer must ensure that employees use the sanitation facilities and inform each employee of the importance of these good hygiene practices to minimize exposure to the hazards in the field of heat, communicable diseases, retention of urine, and agrichemical residues:

1. Use the water and facilities provided for drinking, handwashing, and elimination;
2. Drink water frequently, especially on hot days;
3. Urinate as frequently as necessary;
4. Wash hands both before and after using the toilet; and
5. Wash hands before eating and smoking.

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Required Reports: An employer cited under this section must provide to Cal/OSHA annually for a period of five years after the final order on a citation a declaration giving this information: the estimated peak number of employees; the toilet, handwashing, and drinking water facilities to be provided; and any rental and maintenance agreement related to these requirements.

Recordkeeping: All employers, except those with no more than 10 employees at any time during the prior year, must keep Cal/OSHA records.

These records must be kept on a calendar-year basis and retained for at least five years:

1. A Cal/OSHA Form 301, Injury and Illness Incident Report (replaces Form 101, Supplementary Record of Occupational Injuries and Illnesses) completed on every injury or illness requiring medical treatment but not mere first aid. Labor Code section 5041 defines “first aid” as any one-time treatment of minor scratches, cuts, burns, splinters, or other minor industrial injury. As such, first aid does not require the employer to record the injury, nor does it trigger the need for an Employee Claim form or Employer's First Report form.

   If a physician or other medical technician renders first aid and later performs a follow-up observation of it, the injury is still considered to be within the first-aid exception.

   But if the second visit results in further treatment, then the injury must be recorded.

2. Cal/OSHA Form 300, Log of Work - Related Injuries and Illnesses, is completed from Form 301. Cal/OSHA Form 300A Summary of Work - Related Injuries and Illnesses (replaces Form 200, Log and Summary of Occupational Injuries and Illnesses) must be posted in a conspicuous place in the workplace during the months of February through April every year. Employers who employed ten or fewer employees at all times during the last calendar year, do not need to keep or post Cal/OSHA injury and illness records. See appendix page ?.

In addition to keeping records of occupational injuries and illnesses, an employer must allow employees or their representatives access to the employer's log of occupational injuries and illnesses and to accurate records of employee exposure to potentially toxic substances or harmful physical agents.

GISO section 3203 requires employers to maintain records that document compliance with that regulation's requirements to maintain an effective written injury and illness prevention program. Employers with fewer than 10 employees are exempt from certain record requirements. Here is a summary of the recordkeeping requirements in section 3203(b):

Records of the steps taken to implement and maintain the program include:

1. Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records must be maintained for three years.

   Exception: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.

2 Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. These must be maintained for three years.

Exception No. 1: Employers with fewer than 10 employees can substantially comply with the documentation provision by maintaining a log of instructions provided to the employee with respect to the hazards unique to the employee's job assignment when first hired or assigned new duties.

Exception No. 2: Training records of employees who have worked for less than one year for the employer need not be retained beyond the term of employment if they are provided to the employee upon termination of employment.

Pesticide Safety Regulations

The pesticide worker safety regulations specify safe work practices for employees who handle pesticides or work in treated areas. The term "handle" refers to any activity related to the application of pesticides. Handle includes mixing, loading, applying, repairing or cleaning contaminated equipment, and handling unrinsed containers. The Department of Pesticide Regulation and the local agricultural commissioner enforce the worker safety regulations. Important requirements of the regulations follow.

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Employer/Employee Responsibilities (CCR 6702): Agricultural Employers must:

1. Know the regulations and requirements on pesticide label
2. Tell employees, in a language they understand, about the pesticides used, pesticide safety hazards, personal protective equipment required, other equipment used, work procedures, and pesticide safety regulations
3. Ensure that employees work safely and follow all safety rules.

Employees must:

1. Use the personal protective equipment (PPE)
2. Follow safety rules in regulations and on pesticide labeling.

Hazard Communication (CCR 6723, 6723.1, 6761, 6761.1): Hazard communication ensures that employees know the hazards they may face and what to do to protect themselves from those hazards. Through proper hazard communication, employees will know about the hazards, safe work practices and where records are kept. Pesticide Safety Information Series (PSIS) leaflets A-8 and A-9 are the written hazard communication programs for handlers and field workers, respectively.

Agricultural employers must display PSIS A-8 and A-9 for employees to read. Agricultural employers must also display the following for pesticide handlers and field workers to read:

1. Identification of the treated area
2. Time and date of applications
3. Restricted entry interval (REI)
4. Pesticide product name, active ingredient and EPA registration number.

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Agricultural employers must make available:

1. Material Safety Data Sheets (MSDS), if available, for the pesticides used
2. PSIS leaflets applicable to the use situation.

Training (CCR 6724, 6764, 6770): Employees who handle pesticides must receive adequate training in the

use of pesticides. Training must occur before the employee begins to handle pesticides. Handlers must receive refresher training each year. Training of handlers must include the following for each pesticide or group of chemically similar pesticides (such as organophosphates):

1. The meaning of information on the pesticide label concerning human health effects
2. Hazards of the pesticide, including acute and long term effects
3. Pesticide poisoning symptoms
4. Routes through which pesticides can enter the body
5. Emergency first aid
6. How to get emergency medical care
7. Routine and emergency decontamination procedures
8. Need, limitations, use and cleaning of PPE
9. Prevention, recognition and first aid for heatrelated illnesses
10. Safety requirements for handling pesticides
11. Environmental concerns
12. Warnings about taking pesticides home
13. Regulatory requirements, MSDS, and PSIS
14. Purpose and requirements of medical supervision, when applicable
15. Location of the written hazard communication program, PSIS leaflets and MSDSs
16. Rights as an employee.

Once training is received, then employees must sign the training record. Handler training records must be kept at the work headquarters.

Field workers must receive training every 5 years; and must receive training before working in treated fields.

The training must include:

1. Importance of routine washing after exposure
2. The meaning of posting and REIs
3. Where exposure to pesticides might occur
4. Routes of exposure
5. Acute and long term effects of pesticides
6. Symptoms of overexposure
7. First aid and where to get emergency medical care
8. Warnings about taking pesticides home
9. The hazard communication program
10. Rights as an employee.

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Employees have the right to receive information about pesticides to which employees may be exposed (or it can be given to the employee's physician). Employees cannot be fired for exercising their rights.

Labels and Other Warnings (CCR 6602, 6618, 6674, 6678, 6776): Pesticide labels must be available at the work site. If pesticides are transferred from their original container, the new container must be labeled with the identity of the pesticide, the signal word from the product label and the name of the person or firm responsible.

Before applying pesticides, the applicator must notify the farmer of the application before it takes place. The notice must include:

1. Date and time of the application
2. Name, EPA registration number and active ingredient of the pesticide used
3. Safety precautions required by label or regulations
4. Location of the area to be treated
5. The REI.

The farmer is responsible for warning employees and contractors who may enter or walk within 1⁄4 mile of a treated area. The warning must include:

1. Location of the treated area
2. Any REI
3. Instructions not to enter the field until the REI expires.

The farmer may substitute posting of the treated field for the oral warning, if the label does not require both oral warnings and field posting.

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Emergency Medical Care (CCR 6726, 6766): Agricultural employers must make prior arrangements for emergency medical care, and tell employees the location of the medical facility in case someone is sick or injured on the job. If employees handle pesticides, agricultural employers must post at the work site (or on the work vehicle if there is no fixed work site) the name, address and telephone number of the physician, clinic or emergency room able to provide care. Agricultural employers must make sure that employees are taken to a medical care facility if employees become injured or ill while handling pesticides or exposed to pesticide residues on the job.

Restricted Entry Interval (CCR 6770, 6772, 6774): A restricted entry interval (REI) is the period of time, following a pesticide application, when people are not allowed to go into the treated field for picking (handharvesting), thinning, weeding, tying, pruning, limb propping or similar work. REIs for many pesticides are stated on pesticide labels; others are established by regulation. Both must be observed.

Reentry for activities with no contact, such as operating tractors, is allowed if special protection is used to prevent exposure to residues. People incorporating pesticides into the soil during an REI must wear the same PPE required for the applicator.

People may enter the field during the REI for limited contact activities, such as irrigation, provided certain conditions are met. Those conditions include:

1. Both oral warning and field posting are not required by the label
2. It has been at least 4 hours since the application
3. Inhalation exposure is below acceptable levels
4. Exposure is minimal and limited to the feet, lower legs, hands and forearms
5. The person is wearing PPE required for early entry workers
6. They do not work in treated fields for more than 8 hours
7. The need for the activity is unforeseen.

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Early Entry Requirements (CCR 6771): If employees enter a field prior to the expiration of the REI, employees must be informed of the requirements on the label relating to:

1. Health hazards
2. First aid
3. Symptoms of poisoning
4. Use of PPE required
5. Symptoms and first aid for heat-related illness
6. The need for washing when out of the treated area.

Agricultural employers must provide PPE required for early entry. Employees must not take PPE home to clean it; cleaning is the responsibility of agricultural employers. One pint of water for eye flushing must be immediately accessible for each employee, if the pesticide label requires eye protection. Employers must provide early entry workers with soap, water and towels to wash when they remove their PPE.

Pesticide Postings: The California Department of Pesticide Regulation requires various postings which are

listed in the section “Pesticide Postings” on page 69.

Employers violating these provisions may be subject to both criminal and civil violations.

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Wage-and-Hour Requirements

Minimum Wage

The California minimum wage is $6.75 per hour. The federal minimum wage is $5.15 per hour.

The federal and state minimum wages apply to all nonexempt employees working for covered employers, subject to limited exemptions and subminimum wage provisions. Employers must comply with the higher requirement (*i.e.*, the state minimum wage of $6.75 per hour).

State Exceptions: Exceptions that apply to certain agricultural employees include:

1. **Learners** (employees in occupations in which they have had no previous similar or related experience) may be paid a subminimum wage during their first 160 hours of employment. Learners may be paid not less than 85 percent of the minimum wage rounded to the nearest nickel.

2. A person whose earning capacity is impaired by **physical disability or mental deficiency** may be paid less than the minimum wage, if the employer first obtains a special license from the DLSE.

3. A **parent, spouse, child or legally-adopted child** of the employer is not subject to the minimum-wage laws.

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Piece Rates: Workers may be paid on a piece-rate basis for tasks that can be measured on a unit basis. During any given pay period, the piece rate may not amount to less than the minimum wage and must include compensation for any overtime worked.

Travel Time: Federal and state laws have similar requirements for the payment of wages for time spent by an employee while traveling. Generally, an employer must pay for travel time related to the job. Here is a summary of the rules for travel-time pay:

1. Travel to work and return home: Time spent traveling to and from work is generally not considered hours worked, no matter whether the employee works at one or several workplaces. Wages are therefore ordinarily not due for such commuting time. Typically, farm labor contractors direct employees to report to different worksites with a wide range of travel times. To avoid any misunderstanding, each employee should, when hired, acknowledge that travel distances will vary and that travel between the employee’s home and job assignments is not compensable. A written statement should be given to each employee that describes the farthest destination in various directions to which the employee will have to report.

2. Travel before or after work hours: Time spent by an employee while traveling to execute an assignment as directed by the employer on the way to or from work must be compensated. An example of this is where the employer or its representative (*e.g.*, foreman) tells the employee to check an irrigated field or retrieve spare parts in town while commuting to or from work. Normal commuting time need not be compensated.

3. Travel between job sites: Time spent by an employee while traveling between places of work (*e.g.*, from field to field or from a field to some location to receive instructions or tools) must be compensated.

4. Transportation provided by employer: When the employer provides transportation to employees and

requires them to ride in company-provided transportation, the time spent traveling must be compensated. In contrast, travel time need not be compensated where an employee may choose whether to ride in company transportation.

5. Travel to other work places or meetings: Time spent during an employee's normal working hours traveling out of town for an overnight business trip must be compensated, no matter whether the employee is traveling on a normal workday or on a normal day off. Likewise, all travel time of an employee who travels on a one-day assignment upon the employer's direction must be compensated.

6. Pay rate: Travel time may be compensated at any rate, as long as it is at least the minimum wage, the travel time is separately recorded, and the employer and employee agreed to the travel-time pay rate before the employee incurred the travel time.

Waiting Time: When an employee is "on duty," time spent waiting is considered time worked. For example, harvest employees who cannot work until a trailer arrives from the winery must still be paid while waiting. However, an employee completely relieved of duties need not be compensated, as long as the employee may leave the job, the period of time is long enough for the employee to use it effectively, and the employee is told when to return to work.

Preparation Time: Generally, both federal and state agencies view voluntary activities of employees performed before or after work, such as changing clothes or washing up, as not compensable. However, time spent performing preparatory or concluding activities which are an integral part of the job or required by law or company rules is compensable. Examples of compensable activities performed before or after work include changing clothes and washing up after applying chemicals as required by Cal/OSHA, and sharpening pruning shears.

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Overtime

Non-exempt employees are entitled to premium pay for work performed during specified overtime periods. Most non-exempt non-agricultural employees may work up to 40 regular hours per workweek. Non-exempt agricultural employees in California may work up to six 10-hour days per workweek at their regular pay rate.

Federal: The federal Fair Labor Standards Act (FLSA) requires covered employers to pay an employee at the overtime premium rate of 1½ times the employee's regular rate of pay after 40 hours of work in a workweek. Certain types of work are exempt from this requirement, however.

One such exemption applies to persons employed in agriculture. Section 3(f) of the FLSA defines *agriculture* to mean "(1) farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities . . ., and the raising of livestock, bees, fur-bearing animals, or poultry, and (2) practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." Thus, the term "agriculture" has two distinct subsets:

1. The primary meaning of "farming in all its branches" and
2. A secondary and broader meaning which includes "practices incidental to or connected with farming performed by a farmer or on a farm."

Under the FLSA's secondary meaning of "agriculture," a farmer's employee who is engaged in processing or shipping commodities produced by only his employer is considered to be an agricultural employee. In contrast, a farmer's employee who, during a workweek, processes, ships or otherwise handles any commodity produced by another farmer is not considered to be an agricultural employee for that workweek.

State: Agriculturally-related employees typically fall under one of these four IWC Orders:

IWC Order No. 4 applies only to particular occupations rather than to an entire industry. Thus, it covers only

persons engaged in professional, clerical, technical, mechanical and similar occupations employed by a business that is not covered by an industry order. Take, for example, an agricultural employer who employs only fieldworkers and a secretary. An industry order does not apply to this employer. Order No. 4 therefore covers the secretary. (IWC Order No. 14 covers the fieldworkers.) Other occupations often associated with agricultural employment that are covered by Order No. 4 are office clerks and bookkeepers.

IWC Order No. 8 covers employees of an employer engaged in an industry handling products after harvest, at least some of which were not grown or otherwise produced by the employer. It typically covers commercial establishments that clean, dry, sort, pack, dehydrate, slaughter, ferment or pasteurize a commodity. While Order No. 8 covers the office and transportation employees of such an employer, Order No. 14 covers the employer's fieldworkers.

IWC Order No. 13 covers employees of an employer engaged in an industry preparing on a farm agricultural products for market. It typically covers an employer's employees who prepare for market, in either a fixed structure or on a moving packing plant on a farm, commodities grown or otherwise produced by that employer only, plus the employer's clerical employees and those who transport the commodities to market. Order No. 14 covers the employer's fieldworkers.

IWC Order No. 14 is an occupational order, not an industry order. It thus covers only persons *employed in an agricultural occupation* on a farm or ranch. As noted in the above discussions of IWC Order Nos. 4, 8 and 13, other employees are covered by another IWC order. *Employed in an agricultural occupation* includes activities such as preparing the land for planting, caring for and harvesting of the crop and transporting it directly from the field to market or to the place of first processing. The term also includes the conservation, maintenance and improvement of the farm and its tools and equipment. While performing any of these tasks, an employee is covered by IWC Order No. 14.

Overtime Rules under Order No. 14: While working in an agricultural occupation, an employee must be paid at least 1½ times the employee's regular rate of pay for work performed after 10 hours in a workday or during the first 8 hours on the seventh day of work in a workweek. Such an employee must be paid double the employee's regular rate of pay for hours worked after 8 on the seventh day of work in a workweek.

Overtime Rules under Order Nos. 4, 8 and 13: An employee covered by one of these orders must be paid an overtime premium for work performed after 8 hours in a workday, after 40 hours in a workweek, or on the seventh day of work in a workweek. A covered employee must be paid at least 1½ times the employee's regular rate of pay for work performed after 8 and through 12 hours in a workday, after 40 hours worked in a workweek, or during the first 8 hours on the seventh day of work in a workweek. Such an employee must be paid double the employee's regular rate of pay for hours worked after 12 in a workday or after 8 on the seventh day of work in a workweek.

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Working Under Two IWC Orders: Sometimes an employee who usually works in an agricultural occupation performs non-agricultural work. For example, employees in asparagus operations may move between harvest activities and packing-shed work.

The rules for employees working under two IWC Orders in the same workday or workweek were set by a 1977 Superior *Court decision in California Asparagus Growers Association* v. *IWC*. Generally, a trial court's decision applies only to the parties in the case. However, the state Labor Commissioner has applied this decision throughout agriculture.

This decision allows an employer to have an employee work under both IWC Order No. 14 (Agricultural Occupations) and IWC Order No. 13 (Industries Handling Products on the Farm) in the same workday or workweek and still pay overtime after working 10 hours per workday or 6 days per workweek if the employee's work is properly scheduled and proper records of that work are kept.

The procedure to accomplish this feat is explained in a letter from the state Labor Commissioner. Here are excerpts of that letter:

> There are two points of law in the [decision]. Both of them concern application of overtime rules when agricultural employees are working under two orders. This can

> obviously be a problem since Order 14 requires overtime only after ten hours in a day, while [Order 13 requires] overtime after eight hours. In the decision the court ruled that,
>
> > 1)Daily overtime is controlled by the "Order under which the employee is working when the daily overtime period is reached. . . ."
> >
> > 2)The provision of Order 13-76 for overtime for all hours worked over forty hours in the workweek shall be determined by counting only the hours worked under Order 13-76. Hours worked under Order 14-76 shall not be counted in such determination.
>
> [I]n the Statement As To The Basis for Order 14-80, under Section 3 the following appears,
>
> When, in 1976, the [Industrial Welfare] Commission proposed that its eight-hour day standard in other industries be applied to agriculture as well, it received substantial evidence to warrant a 10-hour day instead. In this review, some sections of agriculture asked for exemptions from overtime requirements. The Commission considered them all, and in that connection made a study of asparagus growing and packing operations. It found that questions raised in connection with the application of two Industrial Welfare Commission Orders, for harvesting and packing, [were answered] to the satisfaction of the Superior Court of San Joaquin County when the adjustment of the workday was explained.
>
> While the sentences quoted above may be syntactically very difficult to parse, the IWC's intent is clearly to approve the decision made in the case. Accordingly, I believe the Division is bound by the Statement of the Basis to enforce Orders . . . 13 and 14 pursuant to the principles set forth above in the California Asparagus Growers' case.

Another feature of the 1977 decision is that the employer can start and end the workday at any time during the calendar day as long as it remains fixed for the season. This allows an employer to start the workday at noon, for instance, and have the employee's workday start in the afternoon in the packing shed, which is under IWC Order No. 13 (*i.e.*, non-agricultural occupation). Then the employee's ten-hour workday ends the next morning while the employee is in the field harvesting under IWC Order No. 14 (*i.e.*, agricultural occupation). That way, no overtime is due for the ninth and tenth hours of work.

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Federal Complication: Under the FLSA an employee who spends any amount of time during a workweek doing non-agricultural work must be paid overtime for all work—including agricultural work—done after working 40 hours in that workweek. For example, suppose in a workweek an employee spent 30 minutes in a packing shed where some of the product was grown by another grower and 591⁄2 hours picking the product grown by his own employer. While the employee spent less than 1% of his time handling another grower's product, it causes him to be treated under the FLSA as a non-agricultural employee for the whole workweek; thus, he must be paid time-and-a-half for 20 hours of work!

In summary, the two key points are:

A. Make sure time records clearly reflect what work was performed at what time of the workday, and

B. Clearly distinguish between work performed as agricultural from non-agricultural during the workday.

Employment in a winery: Employment in a winery—even one where only grapes grown in the winery's own vineyards are crushed—is not considered agriculture under the federal Fair Labor Standards Act (FLSA). This means that an employee who either works exclusively in a winery, or who switches between vineyard work and winery work within a workweek, may work only 40 hours in that workweek at his regular pay rate. For work beyond that limit, the employee must be paid under the FLSA an overtime premium at a rate of 11⁄2 times his regular pay rate. In contrast, an employee is exempt from FLSA overtime in any workweek in

which he works only in agriculture.

Further, an employee working in an agricultural occupation as defined in California Industrial Welfare Commission Order No. 14 may work up to 10 hours in a workday and on six days of a workweek at his regular pay rate. The FLSA regards a "mixed-work" employee (*i.e.*, one doing both agricultural and nonagricultural work in a workweek) as a nonagricultural employee for the whole workweek, even if the ratio of nonagricultural to agricultural work is small. Take, for example, an employee who, over six 10-hour workdays in a workweek, works only one hour in the employer's winery and the other 59 hours doing agricultural work in the employer's vineyard. Under the FLSA, this employee must be paid time-and-a-half for the 20 hours worked beyond the 40-hour limit. (In contrast, under California law, the hours worked in agriculture under Order 14 do not count toward either the eight-hour daily limit or 40-hour weekly limit under IWC Order No. 13, Industries Preparing Agricultural Products for Market, On the Farm.)

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Overtime Exemptions - State

The state wage-and-hour laws contain complete and partial overtime pay exemptions for certain employees. Employees falling within any of these classifications are completely exempt from the overtime pay requirements established by the IWC orders:

Executive, Administrative or Professional Employees: State and federal laws exempt specified executive, administrative and professional from their wage-and-hour requirements. Whether an exemption applies depends on the employee's duties and salary. Because the federal and state exemptions for these so-called "white-collar" employees differ, each must be examined separately when considering whether an exemption applies.

IWC Order 14 exempts an employee engaged in work that is primarily intellectual, managerial, or creative and requires exercise of discretion and independent judgment, for which the remuneration is at least twice the monthly state minimum wage for full-time employment (based on 40 hours per workweek).

The other IWC Orders Order exempt persons employed in administrative, executive, or professional capacities. In addition to meeting the "duties test" noted below, an exempt employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per week). The minimum salary requirement is $2,340 per month. The following requirements apply in determining whether an employee's duties meet the test to qualify for an exemption from those sections:

(A) **Executive Exemption**. A person employed in an executive capacity means any employee: (a) whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision; and (b) who customarily and regularly directs the work of two or more other employees; and (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) who customarily and regularly exercises discretion and independent judgment; and (e) who is primarily engaged in duties which meet the test of the exemption. The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per workweek.)

(B) **Administrative Exemption**. A person employed in an administrative capacity means any employee: (a) whose duties and responsibilities involve the performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers; and (b) who customarily and regularly exercises discretion and independent judgment; and (c)(1) who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or (2) who performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge, or (3) who executes under only general supervision special assignments and tasks, and (d) who is primarily engaged in duties which meet the test of the exemption. The employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment (40 hours per week.)

(C) **Professional Exemption**. A person employed in a professional capacity means an employee who (a) is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting; or (b) is primarily engaged in an occupation commonly recognized as a learned or artistic profession.

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Independent Contractors: Independent contractors are not considered employees for wage-and-hour purposes. The state agencies most involved with the determination of independent-contractor status are the Employment Development Department, which is concerned with employment-related taxes, and the Division of Labor Standards Enforcement, which is concerned with whether laws on wages, hours and workers' compensation insurance apply. Other agencies, such as the Franchise Tax Board and the State Contractor's License Board, also have regulations or requirements about independent contractors. Since different laws are involved, the same individual may be considered an employee under one law and an independent contractor under another. As substantial liabilities may be imposed for misclassifying an employee as an independent contractor, an employer should fully consider whether independent-contractor status is justified before classifying a person as one.

Any business (service-recipient) that prepares an IRS form 1099-MISC relating to payments made to an independent contractor (service-provider) as compensation for services must file with the Employment Development Department (EDD) using form DE 542, *Report of Independent Contractors,* information for the contractor and the contractor's services. See page 35 for more details.

Outside Salespersons: Both federal and state laws exempt outside salespersons from their overtime-premium-pay requirements.

Inside salespersons: Federal and state laws provide narrow overtime exemptions for inside commissioned salespersons. The FLSA's exemption applies only to retail establishments.

Truck drivers: Both the FLSA and IWC orders exempt from their overtime premium pay requirements employees covered by federal or state laws regulating motor carriers. See “Truck Driver Overtime” at the end of this section on page 24.

Parents, spouse or children: Employees who are the parents, spouse or children of the employer are exempt from overtime-premium-pay requirements.

Irrigators: Since they are *employed in agriculture*, irrigators are exempt from the FLSA’s overtime-premium-pay requirements. Further, they are exempt from the overtime-premium-pay requirements of IWC Order No. 14 during any workweek in which they perform an irrigator’s duties for more than half of their hours in that workweek. Those duties include the job functions defined in the U.S. Department of Labor's ***Dictionary of Occupational Titles (DOT)*** (*i.e.*, Head Irrigator, Valve-Pipe Irrigator, Sprinkling-System Irrigator and Gravity Flow Irrigator). But as the ***DOT*** listing of irrigator types is not exhaustive, the state Labor Commissioner has acknowledged that other types of irrigators, such as drip-system irrigators, may fall within the exemption.

Part-Time Employees: IWC Order No. 14 exempts certain part-time employees from the requirement that they receive overtime premium pay on the seventh day of work in a workweek. To qualify, the employee must not have worked more than 30 hours in the workweek or more than six hours in any workday. (The FLSA regulates only the number of hours that may be worked in a workweek and not daily hours or number of days worked. Thus, covered employees are entitled to overtime pay under the FLSA only if they work more than 40 hours in a workweek.)

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Piece Rates and Commissions: To calculate the regular rate where compensation is by the piece or by a commission, either of these two methods may be used:

1. Divide the total earnings for the week, including those during overtime hours, by the total hours

worked during the week, including the overtime hours. Then, for each overtime hour worked, the employee is entitled to receive an additional 1⁄2 of the regular rate for those hours requiring time-and-a-half, and the full regular rate for those overtime hours requiring the payment of double time.

2. Use the piece or commission rate as the regular rate and pay for pieces produced or commissions earned during overtime hours at the applicable premium rate. For example, if the piece rate is 10 cents per unit produced during regular hours, then it would be 15 cents per unit produced during time-and-a-half work hours.

Group Piecework Rate: A group rate for piecework is an acceptable method of computing pay. In this method the total number of pieces produced by the group is divided by the number of persons in the group and each is paid accordingly. The regular rate for each worker is determined by dividing the pay received by the number of hours worked.

Again, the regular rate must be at least the minimum wage. Also, because the regular rate is simply the rate on which earned overtime premium is based, it must be determined only for employees who have worked overtime.

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Non-Exempt Salaried Employees: Overtime pay is computed using an employee's *regular rate* of pay, which is usually an hourly rate. The regular rate of a non-exempt employee paid a salary is usually computed by dividing the employee's weekly compensation by the maximum number of hours (*i.e.*, *regular hours*) the employee may work in a workweek at that regular rate. Where, however, the employer and employee have agreed the salary compensates the employee for fewer hours than that maximum, the weekly compensation is divided by the agreed-upon number of hours.

Here's how to determine the regular rate of a non-exempt employee paid a monthly salary that compensates the employee for the maximum number of regular hours the employee may work.

First, multiply the salary by 12 months per year; this gives the annual rate. Then divide the annual rate by 52 weeks per year; this gives the weekly rate. Then divide the weekly rate by the maximum number of regular hours the employee may work each workweek; this gives the regular hourly rate.

Take, for example, a non-exempt agricultural employee paid a monthly salary of $2,600. The employer and the employee agreed that the salary is intended to compensate the employee for a regular workweek of six 10-hour days (*i.e.*, 60 hours). Then:

$	2,600/month	x	12 months/year	=	$31,200/year
$	31,200/year	÷	52 weeks/year	=	$600/week
$	600/week	÷	60 hours/week	=	$10/hour

The employee's regular rate is thus $10 per hour. So, on top of his or her salary, the employee must be paid $15 for each non-regular hour worked for which overtime pay is due at the rate of 1⁄2 times the regular rate (*i.e.*, time-and-a-half). And, $20 is due for each non-regular hour worked for which overtime pay is due at the rate of two times the regular rate (*i.e.*, double time).

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Alternative Schedules: Certain flexible scheduling arrangements, in which an employee works after 8 hours in a workday without overtime pay, are permissible under the IWC orders. The types of allowable arrangements depend on the IWC order involved. Before an alternative work schedule is implemented, an employer must meet specific requirements. If an alternative schedule is not implemented correctly, the employer may be subject to significant liability for unpaid overtime.

Weekend or Holiday Overtime: Unless required by a contractual obligation or policy adopted by the employer to do so, an employer is not legally required to pay overtime or a premium merely because employees work on holidays, Saturdays or Sundays. Those days are treated like any other day: an overtime premium is due only if the hours worked exceed the limits specified by the applicable IWC order. An

employer choosing to give employees time off with pay for certain holidays need not count the unworked holiday time as "hours worked" for overtime purposes. Overtime is based on "hours worked," not "hours paid."

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Truck Drivers

Federal Provisions: Specified employees (generally, drivers and their helpers, loaders and mechanics) covered by the federal Motor Carrier Act of 1935 are exempt from overtime under the FLSA. Exempt truck drivers under the FLSA are those who haul property or passengers in interstate commerce. The federal Motor Carrier Act applies whenever the load or delivery is on its way out of the driver's state of domicile, while the driver is out-of-state, and during the return trip within the domicile state.

Further, where a driver or driver's helper has not made an actual interstate trip, or a loader or mechanic has not been working on an interstate shipment or vehicle that has been used in such a shipment, they may still be subject to the jurisdiction of the U.S. Department of Transportation (DOT) if:

1. The carrier is shown to have an involvement in interstate commerce and
2. It is established that the driver or driver's helper could have, in the regular course of his employment, been reasonably expected to make one of the carrier's interstate runs or, in the case of a loader or mechanic, could have been reasonably expected to perform as such in the carrier's interstate activity.

Satisfactory evidence of this can take the form of statements from the carrier's employees, or documentation such as employment agreements. Where such evidence is developed with regard to an employee, the DOT asserts jurisdiction over that employee for a 4-month period starting with the date he could have been called upon to, or actually did, engage in the carrier's interstate activity. Thus, such employee would be exempt from the FLSA's overtime provisions for the same 4-month period.

A truck driver covered under the federal Motor Carrier Act may drive for up to 10 hours after having been off duty for at least 8 hours. Before driving again, the truck driver must remain off duty for at least another 8 hours. After having been on-duty for 15 hours—no matter the activity—the driver must have 8 hours off-duty. Further, during any eight consecutive days, a driver may not drive after having been on-duty—no matter the activity—for 70 hours, but the driver may perform non-driving activities.

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State Provisions: Drivers covered by the state Motor Carrier Safety Act are exempt from the overtime premium pay provisions of the IWC orders. However, they are limited to a maximum number of hours on duty. The state allows the exemption for only the truck driver and not for any non-driver who rides along for any other purpose such as to assist in loading or unloading.

Covered by the state Motor Carrier Safety Act are drivers of: motortrucks of three or more axles that weigh more than 6,000 pounds unladen; truck tractors; buses; and trailers and semitrailers designed or used to transport more than 10 persons.

Truck drivers covered by the state Motor Carrier Safety Act may not drive more than 12 hours within a work period or drive after having been on duty for 16 hours. A truck driver may accumulate off duty time in two periods totaling eight hours when resting in a sleeper berth, provided neither period is less than two hours. However, Title 13, California Code of Regulations, section 1212(k) relaxes the driving and on-duty time restrictions for drivers employed by agricultural carriers when transporting farm products from the field to the first point of processing or packing. An agricultural carrier is one who transports for compensation fresh fruits, nuts, vegetables, logs and unprocessed agricultural commodities. These drivers may not drive for any period after having been on duty 16 hours or more after 8 hours off duty nor may they drive after having been on duty for 112 hours in 8 consecutive days.

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Recordkeeping and Payroll

Statement of Wages: When employees are paid, the employer must provide each employee with a written itemized statement that contains this information:

1. Gross wages earned;
2. Total hours worked (if the employee's compensation is based on an hourly wage);
3. Piece-rate units produced and the rate per unit produced;
4. All deductions (deductions authorized by the employee may be aggregated and shown as one item);
5. Net wages earned;
6. The inclusive dates of the pay period;
7. Name of the employee and his or her social security number; and
8. Name and address of the employer (legal entity).

Federal law also requires that the written statement include: (1) the basis on which wages are paid and (2) the employer's federal taxpayer identification number assigned by the Internal Revenue Service.

Like other employers, those paying wages in cash must give each employee this itemized statement of wages. These statements must be recorded in ink or other indelible form and maintained in English. The employer must keep a copy of them.

Recording Hours Worked: Employers must keep in indelible ink records of the time worked by their non-exempt employees. This can be done by writing the time worked on a card or sheet or by having employees punch a time clock. Time records must show when an employee starts and ends each work period, as well as meal periods, split shift intervals and the total daily hours worked.

Payroll and Related Records: The employer must maintain employee records in English in indelible ink or equivalent form. All documents must be properly dated. The employer must maintain comprehensive records showing employees' names, addresses, occupations, social security numbers and ages of all minors. At a central location in the state or at the establishment at which the employees work, the employer must keep payroll records showing the hours worked each day and the wages paid to each employee.

Job Applications; Personnel Files: Employers must keep files of all job applications, personnel and employment-referral records for at least two years after the files are created or received. Employers must keep the personnel files of terminated employees for two years after termination and the files of rejected applicants for two years after the rejection.

INS Form I-9: Every employer must verify the eligibility of every new employee to work in the United States. This is done by using Immigration and Naturalization Service Form I-9. The completed form must be kept for three years after employment begins or one year after employment is terminated, whichever is later. Employers must present Forms I-9 for inspection upon request by an INS or U.S. Department of Labor official. At least three days advance notice of such an inspection must be given.

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Employee Access to Personnel Records

Personnel Records: Every employee has the right to see his or her own personnel record kept by the employer. This includes persons currently employed, those laid off with re-employment rights, and those on a leave of absence. A former employee has a right to inspect his or her own personnel record until the statute of limitations on any claim he or she may have expires. The right of access to personnel records does not extend to applicants, union officials, designated agents, family members or any other person.

Employees are not entitled to see records of criminal investigations or letters of reference. An employee may see records used to determine the employee's qualifications for employment, promotion or salary increases, as well as those that may have been used to discipline or discharge the employee. All

documents kept in the employee's personnel file, with the exception of those documents listed above, are subject to inspection by the employee. An employer must give the employee copies of only documents the employee signed.

The employee may review the personnel file at a reasonable time mutually agreed upon by the employee and employer. The file must be made available during business hours and in the office where the personnel records are usually maintained. The employer may require the employee to inspect his or her file during the employee's free time and by appointment. The employer may monitor the inspection of the personnel file.

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Medical Records: Cal/OSHA regulations require all employers to give employees access to their employee medical records. These records must be made available to the employee or representative designated by the employee. A certified collective bargaining agent is automatically treated as a designated employee representative without written authorization from the employee. These regulations apply to all employee exposure records, medical records, and analysis pertaining to employees exposed to toxic substances or harmful agents.

Specific confidentiality provisions apply to medical records.

Checklist of Forms and Reports: Here is a checklist of forms that must be completed for each new employee and the subjects of which they must be informed when they are hired.

1. Issue Disability Insurance Pamphlet DE-2515: given to employee
2. IRS Form W-4: completed by employee
3. INS Form I-9 (Employment Eligibility Verification): completed by employee and employer
4. Pesticide Hazard Communications & Training for Field Workers and Pesticide Handlers
5. Work Permit: on file for each minor employee
6. Payroll deduction authorization for any payroll deduction not required by law: signed by employee
7. Wages and benefits: explained to employee
8. Safety Training: provided to employee
9. Sexual Harassment Handout or Company Harassment Policy included in employee handbook: given to employee
10. Hazard Communication Program and MSDS's: explained to employee
11. Location of Field Sanitation Facilities: notify employee
12. Good Hygiene Practices: explained to employee
13. Family Care & Medical Leave Notice: posted and in employee handbook
14. Workers' Compensation Orientation: give physician pre-designation form and compensation carrier's pamphlet to employee
15. New-Employee Registration Act Form DE-34: complete and mail to EDD within 20 days
16. Report of Independent Contractors Form DE 542: complete and mail to EDD within 20 days

Workday and Workweek: A workday is any consecutive 24-hour period starting at the same time each calendar day. The 24-hour period may start at any hour of the day. Daily overtime pay is based on hours worked in a workday.

An employer may change the workday or the workweek as long as the change is intended to be permanent. It is not necessary for all employees to have the same workday or workweek.

Hours taken off for vacation, holidays or sick time need not be counted as "hours worked" in determining any overtime obligation.

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Pay Days

Wages must be paid according to a regularly-set schedule. When employees work overtime during a pay period, the payment of only the overtime wages may be delayed to the next payday. Straight-time wages

generally must be paid within seven days of the end of the pay period in which they were earned.

Workers employed by farm labor contractors must be paid at least once a week on a business day designated in advance of payment. Payment must include all wages earned through the fourth day before the payday.

Employees boarded and lodged by an employer (except for those employed by a farm labor contractor, who must always pay weekly) must be paid at least once per month. Payment must include all wages up to the regular payday designated in advance.

All other agricultural employees must be paid twice each month on days designated in advance. Payment must include all wages earned through the seventh day before payday.

Executive, administrative and professional employees, as defined by law, may be paid monthly, as long as all of these conditions are met: (1) They are not covered by a collective-bargaining agreement containing language on paydays to be applied; (2) They are not covered by the FLSA; (3) Their monthly remuneration does not include overtime pay; and (4) They must be paid within seven days after the close of the monthly payroll period.

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Payroll Deductions and Offsets Against Wages

An employer may lawfully withhold amounts from an employee's wages only when: (1) required or empowered to do so by law; (2) when the employee expressly authorizes in writing a deduction to cover insurance premiums, benefit-plan contributions or other deductions not amounting to a rebate of the employee's wage; or (3) when a deduction to cover health, welfare or pension contributions is expressly authorized by a wage or collective-bargaining agreement.

The ability of employers to deduct amounts from a non-exempt employee's wages due to cash shortage, breakage, or loss of equipment is specifically regulated by the IWC orders. Further, several court decisions significantly limit the employer's ability to offset various employee debts, such as overpayment of wages, against the employee's wages. Having written authorization to accelerate repayment of an employee debt does not necessarily make such a deduction legal. Balloon payments on separation from employment are not valid even if the employee agrees to such a repayment schedule in advance. It would be prudent to review with legal counsel any contemplated unauthorized or accelerated payroll deduction.

Final Pay

Discharged or Laid Off: A discharged or laid off employee must be paid upon the discharge all wages then due, including any earned but unused vacation pay. Commission payments that cannot be calculated on the date of termination must be paid by the next regular commission payment due date. An employer must pay a discharged employee at the place and time of discharge.

Quitting Employee: An employee without a written agreement for a definite period of employment who quits without giving prior notice must be paid final wages due within 72 hours after the quit. The final wages of an employee who gives at least 72 hours' advance notice of his or her intention to quit must be paid upon the quit. An employee who quits must be paid at the employer's office or agency in the county where the employee worked. An employee who quits without 72 hours' notice may request that his or her final wage payment be mailed to a designated address. The date of mailing is considered the date of payment.

Time Waiting Penalty: An employer who willfully fails to pay any wage due a discharged or quitting employee by the applicable deadline may be assessed a waiting-time penalty. The penalty is an amount equal to the employee's daily pay for each day the wages remain unpaid, up to a maximum of 30 days. By avoiding or refusing to receive payment of final wages due, an employee becomes ineligible for any waiting-time penalty for the period of that avoidance or refusal. Where a good-faith dispute exists about the amount of the wages due, no waiting-time penalty is imposed. Such a good-faith dispute occurs when an employer presents a defense based in law or fact, which, if successful, would preclude any recovery by the former employee. The fact that a defense is ultimately unsuccessful does not preclude a finding that a

good-faith dispute existed. In contrast, one that is unsupported by any evidence, is unreasonable, or is presented in bad faith precludes a finding of a good-faith dispute, and the waiting-time penalty may be awarded to the employee.

Even where a dispute exists, the employer must pay, without requiring a release, whatever wages are due and not in dispute (*i.e.*, conceded wages). By failing to pay conceded wages, an employer's good-faith-dispute defense against the imposition of the waiting-time penalty is defeated, no matter the outcome of the disputed wages.

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Working Conditions

Rest Periods: Federal law does not require rest periods for employees. The IWC orders, however, require employers to authorize and permit all employees to take rest periods, which must be counted as hours worked. To the extent it is practical to do so, rest periods must be in the middle of each work period. The amount of rest-period time is based on total hours worked daily, with a break of at least 10 minutes for each four hours worked (or major fraction of four hours). Exception: A rest period need not be authorized for an employee whose total daily work time is less than 3½ hours.

An employer must automatically pay an employee an extra hour of wages, at the employee's regular rate of pay, for each workday that a rest period is not provided to the employee. The one-hour is not due an employee who chooses on his own not to take an authorized rest period.

Meal Periods: Federal law does not require meal periods for employees. The IWC orders, however, do require them. Under IWC orders other than Order No. 14 (Agricultural Occupations), an employer may not employ a person for a work period of more than five hours without a meal period of at least 30 minutes. However, where a work period of not more than six hours will complete the day's work, the employer and employee may agree to waive the meal period.

In contrast, IWC Order No. 14 requires employers to authorize and permit all persons employed in an agricultural occupation, after a work period of not more than five hours, to take a meal period of not less than 30 minutes, except that when a work period of not more than six hours will complete the day's work, the meal period may be waived by mutual consent of employer and employee. While the issue has not been resolved, the difference in the wording between Order No. 14 and the other IWC orders may mean an employee covered by Order No. 14 may elect voluntarily to skip an authorized meal period, as the employer's duty appears to be met by authorizing and permitting agricultural employees to take meal periods. The state Labor Commissioner has interpreted the rest-period provision under IWC orders, which uses the same "authorize and permit" language, as meaning an "employer is not subject to any sort of penalty or premium pay obligation if an employee who was truly authorized and permitted to take a rest break, as required under the applicable wage order, freely chooses without any coercion or encouragement to forego or waive a rest period." The same rationale presumably also applies to meal periods because of the use of the same language. An interpretation from the Labor Commissioner on the question has been requested and should be forthcoming soon.

A meal period is not counted as time worked as long as employees are relieved of all duty and allowed to leave the employer's premises during it. Otherwise, it is an "on duty" meal period and counted as time worked. Further, an "on duty" meal period is permitted only where both (1) the nature of the work prevents an employee from being relieved of all duty and (2) the employer and employee have agreed in writing to an on-the-job paid meal period.

IWC orders other than No. 14 further provide that an employee who works more than 10 hours in a day must be provided a second meal period of at least 30 minutes. Exception: If the total hours worked is no more than 12 hours, the employer and employee may agree to waive the second meal period, but only if they did not waive the first meal period.

An employer must automatically pay an employee an extra hour of wages, at the employee's regular rate of pay, for each workday that a meal period is not provided to the employee.

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Reporting-to-Work Pay: Sometimes when an employee reports to work at his or her regularly-scheduled time, the employer finds it necessary to send the employee home because there is no work. In this case, the employee generally must be paid for at least half of the scheduled or usual work hours, but in no case for less than two or for more than four hours. If the employee reports a second time during the same day, he or she must receive at least two hours' additional work or pay for the second appearance.

These provisions do not apply when: (1) the work is interrupted by an act of God or other cause not within the employer's control; (2) operations cannot begin due to threats to the employee or property or when recommended by civil authority; (3) public utilities fail to supply water, gas, electricity or sewer; or (4) the employee is on paid standby status and is called to work at times other than his or her usual shift.

Section 45.1.5 of the ***Enforcement Policies and Interpretations Manual*** of the Division of Labor Standards Enforcement (DLSE) interprets the term "Interruption Of Work." Section 45.1.5 states: "[R]eporting time pay is not required when 'the interruption of work [requiring the second reporting time] is caused by an Act of God or other cause not within the employer's control.' In 2002, DLSE concluded that rain or other inclement weather that makes it impossible or unsafe to work falls into the category of 'an Act of God or other cause not with in the employer's control.' This means that if workers are sent home (either immediately upon reporting to work or during the workday) because of rain or other inclement weather, there is no obligation to pay reporting time pay."

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Uniforms and Tools: Some employers require employees to wear a uniform as a condition of employment. In this case, the employer generally must provide and maintain the uniforms at its expense. *Uniform* includes wearing apparel and accessories of distinctive design or color. Ordinary work clothes are not considered uniforms as long as the employees have free choice of what to wear. Apparel for which the employer specifies the design or color or to which the employer requires an insignia be affixed is considered a uniform.

The employer need not supply to employees uniforms that are standard in their industries, such as white nurses' uniforms or black-and-white uniforms for wait persons, as these can be used from one job to the next.

Employees may be asked to maintain employer-furnished uniforms, when the uniforms require minimal time for care, *e.g.*, uniforms made of a material requiring only washing and tumble or drip drying. Employers must maintain or provide a maintenance allowance for uniforms requiring ironing, dry cleaning, special laundering for heavy soil, or patching and repairs due to the nature of the work. Also, an employer must pay for any personal protective clothing or equipment that the employer is required by law to furnish to employees.

If an employer requires an employee to have certain tools or equipment, or if such tools are required to perform the job, the employer must provide and maintain them for any employee who is paid less than twice the minimum wage. An employee who is paid at least twice the minimum wage may be required to provide and maintain hand tools and equipment customarily required by his or her trade.

Vacations: Paid vacations are not required by law. However, paid vacation benefits offered by an employer are considered the same as wages. Therefore, once they have been earned, they may not be forfeited. An employee offered vacation benefits earns and vests in them daily.

The employer's policy, however, may set the amount of vacation earned and when the vacation time may be taken. For example, an employer's policy may provide that employees earn one week of vacation the first year of employment, but that vacation time cannot be taken until after the employee has completed one year of service.

Nevertheless, an employee covered by such a policy who ends employment before completing one year of service must be paid the accrued *pro rata* vacation earned up to the termination date. The employer may not require that earned vacation pay be forfeited upon termination of employment.

Further, an employer may cap vacation accruals by setting a limit on the amount of earned but unused

vacation an employee may have at any one time. Such a provision states that employees earn no more vacation whenever their accrued vacation time hits a stated limit and will resume earning vacation benefits only after they have used some of their accrued time and are thus once again below the limit. In contrast, a so-called “use-it-or-lose-it" provision in a vacation policy is not legal, as it results in a forfeiture of earned vacation time.

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Holidays: Employers in California are not legally required to provide employees with paid holidays or to pay overtime or premium pay for hours worked on a holiday. However, paid "personal" or "floating" holidays offered by an employer are treated like vacation benefits. Other paid holiday requirements are dependent on the employer's own policy.

Sick Pay: Most California employees participate in the State Disability Insurance(SDI) program, for which they pay through payroll deduction. Employers must give newly-hired employees a copy of the SDI brochure, as well as provide claim forms when an employee is eligible to apply for benefits. Brochures and claim forms can be obtained from the Employment Development Department (EDD). Employers in California are not legally required to provide sick-pay benefits in addition to mandated SDI benefits.

Sick-pay benefits offered an employee in addition to mandated SDI benefits are generally governed by the employer's own policy or the terms of a Health and Welfare Plan that provides them. An exception to this is when sick pay is added to vacation benefits to provide a combined benefit, such as a "time off" plan. In that situation, the combined benefit is treated like vacation pay. Also, employers who provide paid sick leave must allow an employee to use up to half of his or her annual accrued leave to care for a sick parent, child or spouse.

Severance Pay: Neither California nor federal law requires employers to provide severance pay for terminating employees. Employers who provide severance pay as part of an employee benefit plan, however, must comply with the reporting, disclosure, claims procedure, and fiduciary provisions of the federal Employee Retirement Income Security Act (ERISA).

For more information, contact the nearest office of the Pension and Welfare Benefits Administration of the U.S. Department of Labor.

Pension Plans: Neither California nor federal law requires employers to provide pension benefits. Employers who do provide pension benefits, however, must comply with the provisions of the federal Employee Retirement Income Security Act (ERISA).

Medical Insurance and Life Insurance: Employers in California are not legally required to provide medical-insurance or life-insurance benefits. However, an employer offering medical benefits must give a 15-day notice if they will be discontinued. Also, federal and California laws require that employees and their dependents who are covered by a group health plan be offered continuation coverage upon certain events, such as termination of employment.

Different Health Insurance for Different Employees: Employers sometimes wonder about providing health-insurance benefits to employees. They want to know if they can provide one type of coverage to one group of employees, and either different or no coverage to another group.

Generally, an employer may lawfully designate that only certain classifications of employees are to receive health-insurance benefits, as long as employees are not excluded from benefits because they belong to a protected classification.

For example, an employer may lawfully provide health-insurance benefits to salaried employees but not to hourly employees. This is permissible because non-salaried employees do not constitute a protected class of employees.

In contrast, suppose an employer wants to provide its female employees with a better health insurance policy than its male employees. This would clearly be prohibited, since both federal and state laws prohibit discrimination in employment based on sex.

The same principle applies to many other fringe benefits such as holiday pay and sick pay.

Special and complex nondiscrimination rules under the federal Employee Retirement Security Act (ERISA) apply to pension benefits, however.

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Disability Leaves of Absence: Disability leaves of absences are legally required in these situations:

1. **Work-related Injuries and Illnesses**: Generally, an employee whose injury or illness is covered by workers' compensation must be provided a leave of absence for as long as is required to get the employee back to work. An employer may, however, terminate an employee on such a leave due to compelling business necessity or who has been incapacitated for such a long time that it appears unlikely the employee will ever be able to return to work. It is not clear, however, how much time must pass before an employer may safely discharge an injured employee in the latter case; at least a year must pass, but two years or more is safer.

   The employee may also be terminated once the employee's condition has been declared permanent and stationary by the treating physician or agreed medical examiner (AME), with the physician or AME stating the employee cannot do one or more essential functions of the job, either with or without reasonable accommodation. Also, an employer need not reinstate an employee for whom work is no longer available.

   In any event, an employer should consult competent legal counsel before discharging an employee (or any benefit of employee) on a workers' compensation leave. More information can be obtained by contacting your workers' compensation insurance carrier.

2. **Pregnancy Disabilities**: An employer regularly employing five or more employees must grant a leave of absence of up to four months to an employee who cannot work due to a pregnancy-related disability. If more than four months of leave is provided for other non-work-incurred medical disabilities, the length of the pregnancy-disability leave must be at least that allowed for them.

   A pregnancy-disability leave of absence is required only when an employee is disabled due to a pregnancy-related condition. Leaves of absence for the birth or adoption of a child are available to eligible employees of employers covered by the California Family Rights Act. A pregnancy-disability leave does not have to be compensated unless other non-work-incurred medical-disability leaves of absence are compensated. While on pregnancy-disability leave, an employee may use her earned but unused vacation and/or sick-pay benefits, but she cannot be forced to use them.

   An employee returning from a pregnancy-disability leave of absence within the allowed time generally must be returned to the same position she had before her leave began. Otherwise, she must be offered a comparable position.

   More information can be obtained by writing the Department of Fair Employment and Housing, 2014 T Street, Suite 210, Sacramento, CA 95814. Ask for a "Pregnancy Discrimination Fact Sheet."

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Personal Leaves of Absence: Both the federal and state governments have enacted family-leave laws. They differ in scope and application. Employers must comply with the law that requires the more-generous benefit. Here is a summary of the two laws:

California: Under the California Family Rights Act, employers with 50 or more employees in the State of California must provide unpaid time off to employees to care for a seriously ill parent, spouse or child. Eligible employees may take up to 12 weeks of family leave every 12 months. To be eligible for this leave, an employee must have been employed for at least 12 months and have worked at least 1,250 hours in the 12-month period before taking the leave. An employee taking this leave generally must meet certain notice and certification requirements.

This leave does not have to be taken in consecutive days or weeks. An employer need not grant family leave to a parent to care for a child being cared for by the child's other parent.

Family-care leave for the birth of a child may be taken in addition to the pregnancy-disability leave. In other words, pregnancy-disability leave taken by an employee does not count against her state family-care-leave entitlement. After taking up to four months of pregnancy-disability leave, an employee may take up to 12 weeks of family-care leave.

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Federal: Under the Family and Medical Leave Act, employers with 50 or more employees must provide up to 12 weeks of unpaid leave per year to eligible employees to use for: (1) care of a newborn or newly-adopted child, (2) care of a family member with a serious medical condition, or (3) their own illness. To be eligible for this leave, an employee must have been employed for at least 12 months and have worked at least 1,250 hours in the 12-month period before taking the leave. An employee taking this leave generally must meet certain notice and certification requirements.

Covered employers are required, with some exceptions, to restore eligible employees using family leave to the same or equivalent job upon their return and to continue to provide health insurance coverage under the same conditions it would have been provided had the employee worked during the leave.

Court Duty: Every employer must provide a leave of absence to an employee who is required by law to serve on inquest or trial juries or to appear in court as a witness. The employee must give to the employer reasonable notice of the need for this leave. An employee taking court-duty leave need not be compensated for it.

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Other Leaves of Absence

Emergency Duty as a Volunteer Firefighter: All employers must provide leaves of absence for employees who are required to perform emergency duty as a volunteer firefighter. It is not a requirement that the employee be compensated during time off to perform emergency volunteer fife fighting duties.

Time Off To Participate in a Child's Daycare-Facility or School Activities: Employers with 25 or more employees working at the same location must allow a parent, guardian or grandparent with custody of a child in a licensed daycare facility, kindergarten, or grade 1 to 12, to take up to 40 hours off per year (capped at eight hours per month) to participate in the child's daycare-facility or school activities. The employee must give to the employer reasonable notice of the planned absence. Employees must first use existing vacation, personal leave or compensatory time off for this purpose. The time off need not be compensated.

Time Off To Appear at School at School's Request: All employers must allow a pupil's parent or guardian to appear at the pupil's school when the school has given advance notice of a need for the parent or guardian's presence. The employee need not be compensated for the time off. The employee must give reasonable notice to the employer of need to take time off to appear at the school.

Time Off to Vote: If a voter does not have enough time to vote outside of working hours, he or she may take off time to vote at the start or end of a shift, whichever provides the most free time to vote. The employee may take off no more than two hours without loss of pay, as long as he or she has given at least two working days' notice that time off is desired.

Drug and/or Alcohol Rehabilitation: Employers with 25 or more employees must reasonably accommodate an employee's voluntary participation in an alcohol- and/or drug-rehabilitation program, as long as this reasonable accommodation does not impose an undue hardship on the employer. *Reasonable accommodation* means time off work, but such time does not require compensation. An employer must also make reasonable efforts to safeguard an employee's privacy as to his or her enrollment in a rehabilitation program. An employer may refuse to hire or may discharge an employee due to the employee's current use

of alcohol and/or drugs, or because the employee cannot perform his or her duties, or cannot perform the duties in a manner that would not endanger his or her health and safety, or the health and safety of others.

Literacy Assistance: Employers with 25 or more employees must reasonably accommodate and help any employee who reveals a literacy problem and asks for employer help either in enrolling in a literacy assistance program or in arranging visits of an instructor to the job-site, as long as such accommodation does not pose an undue hardship on the employer. *Reasonable accommodation* means time off work, but such time does not require compensation. Further, the employer must make reasonable efforts to safeguard the employee's privacy as to a literacy problem. An employee who satisfactorily performs his or her duties may not be discharged for disclosing a literacy problem.

Temporary Military and/or Reserve Duty Leave: An employee who is a member of the Reserve Corps of the Armed Forces of the United States, the National Guard or the National Militia is entitled to a temporary leave while engaged in military duty ordered for purposes of military training, drills, encampment, naval cruises, special duty or like activity. Such temporary leave need not exceed 17 calendar days including travel time and need not be compensated.

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Farm Labor Contractors

Using a Farm Labor Contractor

Responsibilities of a Grower or Farm Labor Contractor (FLC) Using an FLC

Federal: The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) requires a grower to take reasonable steps to determine that the FLC has a valid Certificate of Registration issued by the WHD. Where the FLC will transport or house workers, the certificate must authorize those activities. The grower may either rely on the FLC's possession of a Certificate of Registration that is valid on its face or may confirm the FLC's registration through the WHD's central FLC registry. The registry's toll-free number 1-(800) US-Wages [(800) 879-2437]. Call the registry between 5 a.m. and 1:30 p.m. California time. While not required, a grower should ask the FLC for a photocopy of the certificate and then keep it on file.

MSPA Requirements for All Entities: Any person or entity covered by the MSPA, including growers who recruit or employ migrant agricultural workers or seasonal agricultural workers, must adhere to these rules:

1. Specified information must be disclosed in writing to recruited migrant agricultural workers and day-haul seasonal agricultural workers when they are recruited. (Form WH 516.) (For seasonal agricultural workers other than day-haul workers, the information must be disclosed in writing only upon the worker's request when an offer of employment is made to the worker.)

   Also to be disclosed are the name of the workers' compensation insurance carrier, the name(s) of the policy holder(s), the name and telephone number of each person who must be notified of an injury or death, and the time period within which the notice must be given. This disclosure requirement may be met by giving the worker a photocopy of any workers' compensation insurance notice required by State law. California Labor Code sections 3550 and 3551 require employers to post and to give to each new employee by the end of the first pay period specified workers' compensation information.

2. In a conspicuous place at the place of employment, a poster specifying the rights and protections afforded to workers under the MSPA must be posted. (Form WH 1376.)

3. Anyone who provides housing for a migrant agricultural worker must post in a conspicuous place at the site of the housing or present to workers a statement of the terms and conditions, if any, of occupancy of such housing. (Form WH 521.)

4. Specified payroll records must be made and kept for three years and an itemized written statement must be provided to each worker each pay period. A grower who receives from an FLC a copy such

payroll records must keep them for three years (see item 5 under “Requirements for Farm Labor Contractors,” above).

5. No FLC or grower may knowingly provide false or misleading information to any migrant agricultural worker or seasonal agricultural worker about the terms, conditions or existence of agricultural employment and housing required to be disclosed by the MSPA.

6. All information required to be disclosed in writing must be in English or, as necessary and reasonable, in Spanish, or another language common to migrant agricultural workers or seasonal agricultural workers who are not fluent or literate in English.

7. No person employing migrant agricultural workers or seasonal agricultural workers may:

   a. Fail to pay wages when due;
   b. Require workers to purchase goods or services solely from the FLC or grower; or
   c. Violate the terms of any working agreement made with any migrant agricultural worker or seasonal agricultural worker.

State: Before engaging an FLC, a grower must inspect the FLC's license to see if it reasonably appears on its face to be genuine. Second, the grower must get from the FLC a copy of the license and then keep it for three years after the contract's termination. Third, the grower must verify the FLC's license by contacting an FLC verification unit established by the state Labor Commissioner.

The grower must perform the verification by the close of the third business day after the day on which the grower engaged the FLC. The verification unit must respond to the verification request within 24 hours of receiving it. Meanwhile, the grower may receive services from the FLC and is not liable for violations of the FLC if it turns out the FLC's license is not valid, in which case the grower must cease using the FLC's services upon receiving notice of its invalidity.

The same duties apply to an FLC who engages the services of another FLC. A grower or FLC who fails to take these steps faces both criminal penalties and civil liability. A grower or FLC who violates any of these requirements is guilty of a misdemeanor punishable by a fine of up to $1,000 and/or imprisonment in the county jail for up to six months. Further, a grower or FLC using the services of an unlicensed FLC without taking the required steps faces liability for worker claims directly resulting from a violation of any state law regulating wages, housing, pesticides or transportation committed by the unlicensed FLC.

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Independent Contractor Reporting

Any business (service-recipient) that prepares an IRS form 1099-MISC relating to payments made to an independent contractor (service-provider) as compensation for services must file with the Employment Development Department (EDD) using form DE 542, *Report of Independent Contractors,* information for the contractor and the contractor's services. *Service-provider* means a natural person (that is, not a corporation, partnership or other entity) who is not an employee of the service-recipient and who received compensation or executes a contract for services performed for that business.

The report must be submitted to the EDD within 20 days of the first payment that is $600 or more in any year to the service-provider and include this information: (1) the service-provider’s full name, address, and social security number; (2) the service-recipient's name, business name, address, and telephone number; (3) the service-recipient's federal employer identification number, California state employer account number, social security number, or other identifying number as required in consultation with the Franchise Tax Board; (4) the date the contract is executed, or if no contract, the date payments in the aggregate first equal or exceed $600; and (5) the total dollar amount of the contract, if any, and the contract expiration date.

For each failure to comply with this reporting requirement (unless the failure is due to good cause), the EDD may assess a penalty of $24, or $490 if the failure is due to conspiracy between the service-recipient and service-provider not to supply the required report or to supply a false or incomplete report.

A fact sheet and forms are available from the EDD at www.edd.ca.gov/txicrfs.htm

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Land or Vineyard-Management Services

In California agricultural land is often managed by a firm that does not own or lease it. These firms include companies typically referred to as vineyard management or orchard management operators. Because California law defines the term *farm labor contractor* more broadly and contains narrower exceptions from it than does federal law, the state Division of Labor Standards Enforcement (DLSE) often deems such land-management companies (LMCs) as FLCs under California law, even though they are not so deemed under federal law.

California Labor Code section1682, subdivision (b), defines *farm labor contractor* as *any person who, for a fee, employs workers to render personal services in connection with the production of any farm products . . . for . . . a third person . . . .*

Citing that definition, the DLSE has issued opinion letters stating that LMCs often are FLCs. The rationale is that an LMC, as one of the services it provides to a landowner or lessee, employs workers in connection with the production of farm products for a third person—the "third person" being the landowner or lessee.

The DLSE deems an LMC *not* to be an FLC only where the LMC leases the land from the landowner (or subleases it from the lessee), or where the landowner or lessee otherwise relinquishes to the LMC *all* control of the operation. An agreement that reserves in the landowner or lessee the right to approve a production plan or budget proposed by the LMC does not satisfy the latter test.

An LMC deemed an FLC under state law must thus be licensed as such by the DLSE. A landowner or lessee using the services of any FLC should verify that the FLC is licensed as such by the state and, if applicable, registered as such under federal law.

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Grower Checklist for FLC Compliance

Before contracting with an FLC, a grower should review the FLC's credentials and business practices. A qualified FLC with a good track record is less likely to violate—either intentionally or inadvertently—the many laws the FLC must obey. By contracting with such an FLC, a grower in turn reduces the chance that he or she will face charges of liability for wrongdoing or mistakes committed by the FLC. In other words, if the FLC is doing everything right, neither the employment-law enforcers nor the FLC's employees will have any problem with either the FLC or the grower.

Further, if the FLC were to commit a violation and the grower charged with it, the review could help the grower defend against it. By having evaluated the FLC in this way, the grower could assert he or she exercised reasonable care in choosing and contracting with the FLC. The grower could accordingly claim that by having exercised such reasonable care, he or she should not be held responsible for the FLC's violation.

Here is a sample checklist to aid in the review of an FLC's credentials and business practices. Most FLCs should be able to provide the information called for in the checklist with slight effort.

Federal Certificate of Registration

- ❑ Received copy from FLC? Registration No.: _____
- ❑ Verified Registration with DOL at 1-(800) US-Wages [(800) 879-2437]? Date Expires: _____
- ❑ Certificate of Registration for FLC Employee on file?
- ❑ Transportation Authorized?
- ❑ If transportation authorized:

- ❑ A. Vehicle Mechanical Inspection Form WH-514 on file for each vehicle?
- ❑ B. Doctor's Certificate for each driver on file?
- ❑ C. CHP Farm Labor Vehicle inspection on file
- ❑ D. Driver licenses of each FLC's driver on file?
- ❑ E. Farm Labor Vehicle drivers have Class B license with Farm Labor Vehicle endorsement?
- ❑ F. Liability Insurance Policy & Form MBCU 3298 on file?[1]

❑ Housing Authorized? If housing authorized, are housing permits and current inspection reports on file?

California Farm Labor Contractor License

❑ Received copy from FLC? Licence Number _____ Keep for 3 years after contract's termination

❑ Verified license with DLSE FLC Verification Unit? (415) 703-4854 or (559) 248-1892 Verification #: _____

❑ Date FLC License Expires: _____

Tax Status

❑ Registered with Internal Revenue Service (IRS)?

❑ Employer Identification Number (EIN): _____

❑ IRS Tax Information Authorization (Form 8821) on file?

❑ FLC's tax status is clear?

❑ Registered with California Employment Development Department (EDD)?,

❑ EDD Registration Number: _____

❑ Registered with California Franchise Tax Board? Registration Number: _____

Other licenses and permits

❑ Current Business License on file? (copy from FLC)

❑ County Agricultural Commissioner Registration Form on file?

Workers' Compensation Insurance

❑ Current Certificate of Insurance is on file?

❑ WC carrier will send Certificate of Insurance?[1]

Cal/OSHA Compliance

❑ Written Injury and Illness Prevention Program?

❑ Safety Training documentation?

❑ Safety Inspections documented?

❑ Written Hazard Communication Program?

❑ MSDS's available to employees?

❑ CPR/First Aid Training Certificates?

❑ First-aid kit(s) approved by FLC's physician?

❑ Emergency Action Plan?

Pesticide Compliance:

❑ Field employee pesticide training documentation?

❑ Handler pesticide training documentation?

❑ Pesticide Safety Information Sheet A-9 posted?

❑ Pesticide Safety Information Sheet A-8 posted?

❑ Pesticide Material Safety Data Sheets available?

FLC/Grower Agreement

❑ Agreement signed by FLC?

❑ FLC to secure a Labor Payment Bond? Amount: $ _____

❑ FLC to secure comprehensive general liability insurance naming grower as additional insured?

❑ FLC to indemnify and hold harmless grower?

❑ Binding arbitration of disputes?

❑ FLC to give grower copy of payroll information with each invoice?

❑ FLC to provide evidence of employment-tax payments?

❑ FLC to provide required field sanitation?

- ❑ FLC to post required state and federal notices?
- ❑ FLC to keep INS Form I-9 (Employment Eligibility Verification) for all employees?
- ❑ Grower may inspect FLC's pertinent employment documents?
- ❑ FLC will ask grower for up-to-date information about pesticide application and hazard communication before entering production areas?
- ❑ FLC has a policy on good-hygiene and crop-handling practices that has been communicated to FLC's employees?

[1] Insurance carriers will provide 10-day notice of cancellation.

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Farm Labor Contractor Requirements

Federal registration and state licensure are required before one may operate as a farm labor contractor (FLC). The United States Department of Labor, Wage and Hour Division (WHD), registers FLCs. The California Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), licenses FLCs, including day haulers (*i.e.*, persons transporting farm workers for a fee).

Federal Registration: Every FLC doing business in California, and every person performing contracting duties for a FLC, must be registered with the WHD. Registration applications are available at the local office of the U.S. Department of Labor and are usually available at local offices of the California Employment Development Department.

Before using an FLC's services, a grower must take reasonable steps to determine that the FLC has a valid Certificate of Registration issued by the WHD. Where the FLC will transport or house workers, the certificate must authorize those activities. The grower may either rely on the FLC's possession of a Certificate of Registration that is valid on its face or may confirm the FLC's registration through the WHD's central FLC registry. The registry's toll-free number 1-(800) US-Wages [(800) 879-2437]. Call the registry between 5 a.m. and 1:30 p.m. California time. While not required, a grower should ask the FLC for a photocopy of the certificate and then keep it on file.

State License: Every FLC doing business in California must be licensed by the DLSE. Information on California's FLC licensing requirements can be obtained by writing to: DLSE, Licensing Section, P.O. Box 420603, San Francisco, CA 94142.

Migrant and Seasonal Agricultural Worker Protection Act (MSPA): The Migrant and Seasonal Agricultural Worker Protection Act (MSPA) covers the activities of farm labor contractors and agricultural employers who employ migrant or seasonal agricultural workers. The law is enforced by the Wage and Hour Division of the U.S. Department of Labor.

MSPA Requirements for Farm Labor Contractors: The MSPA requires every person doing business as an FLC to:

1. Possess a certificate of registration specifying which farm labor contracting activities the FLC is authorized to perform (*e.g.*, recruiting, transporting, or housing of agricultural workers).
2. Use only persons who possess a valid certificate of registration when hiring employees (i.e., crew bosses) to perform farm labor contracting activities. An FLC is liable for the acts of his employees, no matter whether the employee is registered.
3. Carry the certificate of registration at all times while performing farm labor contracting activities.
4. Notify the DOL within 30 days of each change of permanent place of residence, information on new vehicles used to transport workers, or information on the use of another housing facility for workers.
5. Give to each grower to whom the FLC furnishes workers copies of all payroll records made by the FLC regarding those workers with respect to the work they performed for the grower.
6. Obtain at each place of employment and make available for inspection to every worker the FLC furnishes for employment a written statement of conditions of such employment.

Penalties: Anyone who violates the MSPA may be fined up to $1,000 or sentenced to prison for a term up to one year, or both. Upon a subsequent conviction the person may be fined up to $10,000 or sentenced

to prison for a term up to three years, or both.

Private Right of Action: Any worker aggrieved by a violation of the MSPA or any regulation under it by a farm labor contractor, agricultural employer or any other person may file suit in U.S. District Court. If the court finds that the respondent intentionally violated any provision of the MSPA, the court may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation. However, multiple infractions of a single provision of the MSPA constitute only one violation for the purpose of determining the amount of statutory damages due a plaintiff.

If the complaint is certified as a class action, the court may award up to $500 per plaintiff per violation, up to a maximum of $500,000.

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Employment Insurance

Workers' Compensation

All California employers must provide workers' compensation benefits to an employee who is injured or becomes ill due to his or her job. Employers must give every new employee, either when the employee is hired or by the end of the first pay period, written notice of the employee's right to receive workers' compensation benefits should the employee be injured on the job.

The cost of workers' compensation insurance is the employer's responsibility. An employer may not require an employee to pay any of the cost of its workers' compensation coverage, including any out-of-pocket medical expenses.

The workers' compensation program in California is administered by the Division of Workers' Compensation (DWC) in the Department of Industrial Relations. The Workers' Compensation Appeals Board adjudicates disputes between injured employees, insurance carriers and employers as to the merits of an employee's claim.

Premiums: Workers' compensation insurance premiums charged to an employer are generally based on its business type (classification), claim history (loss experience) and the total wages it pays (payroll). An employer in California is placed in one of more than 400 different classifications.

Employers in the same classification may have very different loss experience, which causes their insurance premiums to be different. An employer with more than $19,000 of premiums over a three-year period is subject to experience modification, which is applied to its premium. This so-called "ex-mod" is used to determine the premium it will be charged relative to other employers in its classification. An ex-mod of 100 percent means an employer's loss experience is average. One with a higher loss experience than such an employer would pay a higher premium.

Coverage: California's workers' compensation system covers nearly all employers and employees. To be entitled to workers' compensation benefits, a person must be an *employee* of a covered *employer* as those terms are defined in the Labor Code.

Employer Defined: Labor Code section 3300 defines an *employer* as:

1. The state and every state agency.
2. Each county, city, district, and all public and quasi-public corporations and public agencies therein.
3. Every person including any public service corporation, which has any natural person in service.
4. The legal representative of any deceased employer.

Employee Defined: Labor Code section 3351 defines *employee* as "every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed." The term includes aliens, minors, corporate officers and directors while rendering actual service for the corporation for pay (except that where they are the sole shareholders thereof, they and the corporation become covered only if they elect to do so), domestic employees (other than one who is employed by his or her parent, spouse or child), and all working members of a partnership who receive wages irrespective of profits from the partnership (except that where the working members of

the partnership are general partners, the partnership and the partners become covered only if they elect to do so. If a private corporation is a general partner, "working members of a partnership" includes the corporation and its officers and directors who are its sole shareholders).

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Employee Exclusions: Labor Code section 3352 excludes from the definition of employee various categories of other persons. The exclusions do not pertain to agricultural employment.

Responsibilities of Employers: California's workers' compensation laws require employers to:

1. Secure workers' compensation insurance for employees, either under a policy from an insurer or by obtaining a certificate of consent to self-insure. (Failure to do so is a misdemeanor for which criminal penalties and injunctive action may result.)
2. Provide compensation benefits within a reasonable period to an injured employee. (Failure to comply may result in the employee's total benefits being increased 10% as a penalty against the insurer and employer.)
3. Provide within one working day after learning of an injury a claim form and a notice of potential eligibility for benefits to the injured employee or, in the case of death, to his or her dependents. The notice must include a description of the procedures and help available to the employee. (For more information about the claim form and notice, see "Workers' Compensation" in the section "Posters, Notices and Disclosures" on page 69 and "Notice of Injury by Employee" and "Employee Claim Form" in this section.)
4. File with the insurance carrier an "Employer's First Report of Injury" within five days after learning of a reportable injury. See explanation of "Reportable Injury" in this section.
5. Post and keep posted in a conspicuous place frequented by employees during the workday a notice stating either the name of the current compensation insurance carrier or the fact that the employer is self-insured, who is responsible for adjusting claims and the employee's rights.
6. Give every new employee, either when the employee is hired or by the end of the first pay period, written notice of the employee's right to receive workers' compensation benefits should the employee be injured on the job. This is in addition to the posting requirement mentioned above.
7. Notify an injured employee of the availability of rehabilitation services when the disability exceeds 27 days. A copy of the notification must be forwarded to the State Department of Rehabilitation. Either the employer or its insurer must comply with this requirement.
8. Give an employee, together with the last payment of temporary disability indemnity, a notice stating the employer's position on the payment of permanent disability indemnity to the employee. For more details see "Permanent Disability Indemnity" in this section.
9. Give an employee, upon request, a form to indicate the employee's personal physician.

Other employer obligations as to occupational illnesses and injuries are covered in the section "Cal/OSHA Safety and Health Requirements" starting on page 9.

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Reportable Injury: An employer must file a complete report of every occupational injury (including an illness) incurred by an employee that results in lost time beyond the date of the injury or requires medical treatment beyond first aid. The report must be filed with the insurer within five days after the injury has been reported to the employer. "Lost time" means an absence from work for a full day or shift beyond the date of the injury, and "first aid" means any one-time treatment of minor scratches, cuts, burns, splinters, and so forth, that does not require a physician's services.

Specifically, an injury requiring only first aid need not be reported. Such first aid may be provided by the employer or a physician or other health-care provider. To avoid opening a workers' compensation claim, an employer may choose to pay for the medical treatment of these minor industrial injuries. The employer should ask the medical provider to bill it directly. However, the employer should be aware that a second treatment, other than mere observation, of an injury will bring it within the definition of a reportable injury. In this case, the employer must provide the injured employee with an Employee Claim form and submit an Employer's Report of Occupational Injury or Illness to its workers' compensation insurer.

Only an injury that arises out of employment triggers the employer's duties under the workers' compensation

laws. Thus, an employer who is positive an alleged on-the-job injury is fraudulent (i.e., no injury exists or it did not arise out of employment) may choose to refuse to provide a claim form and medical treatment to the individual and to report it to the insurer. An employer taking this route must be sure it can prove its position, as the individual alleging the injury may seek to adjudicate the issue before the Workers' Compensation Appeals Board. The outcome hinges on the weight of the evidence and the credibility of testimony, and the employer faces penalties should it be held the employee did indeed incur a covered injury.

Notice of Injury by Employee: An employee must notify his employer about a work-related injury within 30 days after incurring it. The notice of injury must to be in writing and signed by the injured person or someone on his behalf. However, knowledge of an injury obtained by the employer, or by the employer's manager, supervisor, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to enable the employer to investigate the facts, is considered sufficient notice.

Employee Claim Form: Within one day after learning of an injury, an employer must give the injured employee a claim form and a notice of potential benefit eligibility. The form must state the injured employee's name and address and the time, place and nature of the injury. The notice must include: a description of the procedures and help available to the employee; the procedure used to start proceedings to collect benefits; the telephone number of the Office of Benefit Assistance and Enforcement; and a statement that the employee has the right to consult with the Office of Benefit Assistance or an attorney.

The completed claim form must be filed with the employer by the injured worker or, in the case of death, by a dependant of the decedent employee, or by an agent of the employee or dependant.

Form to Indicate Physician: An employee may be treated by his or her own personal physician for an injury requiring more than first aid immediately after the injury if, before the injury, the employee notified the employer in writing of the name of the regular personal physician who has previously directed the employee's medical treatment and who has the employee's medical history and records. The law does not permit the employee to select a chiropractor at this initial stage. The employer may require an employee who selects his or her own personal physician to be examined by a medical consultant of the employer's choice, at the employer's expense, at reasonable intervals. Upon an employee's request, an employer must provide the employee with an appropriate form on which the employee may indicate the name of his or her "personal physician."

Disability Benefit Payments: Disability benefit payments include the services of a physician, hospital care, physical restoration, dental care, prescriptions, medical and surgical supplies, crutches, X-rays, laboratory tests and studies and all other necessary and reasonable apparatus and care ordered by the treating physician. There are no deductibles. The employer or its workers' compensation insurance carrier pays for all medical and hospital care.

In addition to all necessary medical treatment, an employee is entitled to mileage fees from home to the place of treatment and/or examination and back.

Medical Treatment: An employer may require an employee injured on the job to be treated by a physician designated by the employer within the first 30 days of the injury, unless the employee could not report the injury before receiving emergency services or the employee previously indicated, in writing, that he or she wanted to be treated by another physician. Despite the 30-day provision, however, after an injury has been incurred where the employee has not previously indicated another physician, the employee may orally or in writing request another physician.

Premium Calculations: The premium an employer pays for workers' compensation insurance is based on earnings of employees. The earnings of each employee are multiplied by an occupational classification rate for the class of employee.

Traveling To or From Work: Generally, workers' compensation does not cover an employee while going to or returning from work. However, this rule has many exceptions. If the employee's travel to or from work benefits the employer, then the trip is considered as having been made within the scope of employment. For example, the trip of an employee told to pick up supplies on the way to work is covered. Also, if an employee is expected to perform a service for the employer, such as bringing other employees to work, then the time traveling is covered.

Injuries sustained during the course of "special missions" are compensable, even though part of the trip

could be considered going to or returning from work. For example, an employee who is not required to report to work at any particular place but travels in the course of his duties is considered to be on a special mission. Where an employer provides transportation to or from work, the employee is inferred to be within the scope of employment. This also applies to employees driven to work by an employee paid by the employer to provide car-pooling services, even though the employee uses his own vehicle. Traveling time is also covered under workers' compensation where the employer pays or reimburses employees for the time spent or expenses incurred in traveling to or from work.

Exclusive Remedy; Exceptions: With some exceptions, workers' compensation is the exclusive remedy available to an employee for a job-related injury. Thus, an employee injured on-the-job generally may not sue or get tort damages from his employer. However, an injured employee may sue his employer if it failed to cover him with workers' compensation insurance, or may apply for workers' compensation benefits as though he were covered, or both.

Serious and Willful Misconduct: Where an employee is injured due to his employer's serious and willful misconduct, the amount of compensation otherwise recoverable is increased by one-half. There is no limit on the recoverable compensation, and the liability is not insurable. Serious and willful misconduct involves: (1) a deliberate act done to injure another, (2) an intentional act with the knowledge that serious injury is a probable result, or (3) an intentional act with a reckless disregard of its possible consequences. An employer must have known of the dangerous condition or safety order violation and failed to take corrective action either deliberately or with a reckless disregard for the consequences.

Illegally-Employed Minors: A minor under 16 years of age who is injured while employed illegally (*e.g.*, working during school hours or after 10 p.m.) is awarded an additional amount equal to 50 percent of his workers' compensation benefits. There is no cap on the award, and the liability is not insurable, so the employer must pay it.

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Discrimination - Labor Code Section 132a: Labor Code section 132a prohibits an employer from discharging an employee for filing a claim for the payment of workers' compensation benefits or a complaint with the Workers' Compensation Appeals Board, or for testifying or making known his intention to testify in a case under consideration by the Board.

A common problem associated with on-the-job injuries is where an injured employee misses work due to the injury and is discharged for poor attendance. The California Supreme Court has held that an employer may not discharge an employee solely because of absences from work due to a job-related injury.

Another problem associated with Labor Code section 132a is where an injured employee has returned to work but is chronically absent or does not perform up to company standards, especially where the employer tolerated such performance or attendance before the injury. Extreme caution should be used in this situation.

An employer should consult legal counsel before discharging any employee who has incurred an on-the-job injury. Discriminating against an employee because of an occupational illness or injury is a misdemeanor, and the employee's compensation may be increased by one-half up to $10,000. Also, the employee may be entitled to reinstatement and reimbursement for lost wages.

Penalties: Employers face significant criminal and civil penalties for failing to procure either workers' compensation insurance or authorization by the State of California to be self-insured. An employer lacking this insurance is fined $1,000 for each employee on its payroll. For example, an employer with 10 employees would be fined $10,000. In addition, investigators will close the employer's business until the insurance is procured. While it is closed, the employer must still pay its employees their regular pay for up to 10 days.

Postings: Required postings are discussed in the section "Workers' Compensation" on page 69.

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Unemployment Insurance

California participates in a joint federal/state unemployment insurance program designed to reduce the effect of economic fluctuations and to help those who become unemployed through no fault of their own.

With few exceptions, all California employers are covered by the unemployment insurance law and must pay the applicable unemployment insurance tax. A former employee is ineligible for benefits if he or she is out of work for any of these reasons:

1. Voluntary quit without good cause;
2. Discharge for willful misconduct; or
3. Refusal of suitable work.

Employers may respond to a claim for unemployment insurance by a former employee. An employer may appeal a final benefit-payment determination with which it disagrees.

Covered Employers: Under the California Unemployment Insurance Code, the term "employer" includes any individual, joint venture, partnership, association, trust, estate, joint stock company, insurance company, corporation (whether domestic or foreign), community chest fund, foundation, receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person.

An employer becomes subject to UI as an employing unit, if the employer employed within the current calendar year or had within the preceding calendar year one or more employees and paid wages in excess of $100 during any calendar quarter.

Employers with less than $100 of quarterly payroll are exempt from state unemployment insurance (UI) law. New employers register by filing Form DE-1 and pay a 3.4 percent UI tax on wages up to $7,000 per worker per calendar year. When an employer receives an identification number, it also will receive information concerning all state-required employment taxes and reporting requirements.

Experience Rating: Employers are usually in business 2-3 years before they are experience rated, with individual state UI tax rates ranging from 0.7 to 5.4 percent, depending on the employer's unemployment experience. The experience ratings for employers hiring seasonal agricultural labor frequently rise to the 5.4 percent ceiling.

Employer Account Number: Employers are required to register within 15 days after becoming subject to the Code. Registration forms are available at the nearest Employment Tax District Office or at headquarters in Sacramento. All registered employers must report any change in business name, form or entity.

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Each liable employer is assigned an eight-digit employer account number. This number appears on the Quarterly Contribution Return (DE 3) and other documents sent to the employer which are related to the collection of unemployment and disability insurance contributions and used in the determination of benefits. Employers should use this number on all correspondence, forms, and remittances submitted to the Department.

Required Records: Every registered employer is required to keep a true and accurate record of:

1. All workers and their status, (i.e., employed, on layoff or leave of absence.)
2. The wages paid by the employer to each worker.
3. The period covered by all payrolls.
4. For each employee:
   A. Name.
   B. Social Security Account Number.
   C. The date on which the individual was hired, rehired, or returned to work after temporary layoff, and the date when the individual's name was removed from the payroll.
5. The wages paid to each employee for each payroll period, showing separately:
   A. Money wages;

B. Cash value of all other remuneration received from the employer;
C. Special payments in cash or kind for services rendered exclusively in a given pay period such as annual bonuses, gifts, prizes, etc., showing the nature of such payments and the period during which the services were performed for which such special payments were made.

Time Limits of Records: Employers subject to the Code must keep required records for at least four years after the date the contributions to which they relate become due, or the date they are paid, whichever is later.

Posting and Notice Requirements: Employers must post on the premises in places accessible to employees printed statements about benefit rights and other matters as may be prescribed by regulations. These printed statements are furnished by the Department and include posters such as "Notice to Employees" about rights and responsibilities under the Code.

Employers must also make available to each employee when they become unemployed printed statements or pamphlets about benefit rights. These pamphlets are supplied by the Department and include forms DE 2320 and DE 2515 on unemployment insurance and disability insurance benefit claims information.

The poster *Notice to Employees of Unemployment Insurance and Disability Insurance* (DE-1857A) may be obtained from the local Employment Tax Office of the EDD. See page 67 for more information.

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Written Notice to Employee: An employer must give an employee who is laid off or discharged or who takes a leave of absence written notice of the change in status. The notice must include: (1) the employer's name; (2) the employee's name; (3) the employee's social security number; (4) the date of the action; and (5) whether the action was a discharge, layoff, leave of absence, or change in status from employee to independent contractor.

No written notice is required in any of these situations:

1. Voluntary quit
2. Promotion or demotion
3. Change in work assignment or work location
4. Cessation of work due to a trade dispute

Penalties: Employers are subject to a $100 per employee penalty for the failure to register with EDD as an employer when the failure is due to “intentional disregard or an intent to evade employment taxes.” This penalty applies only to the calendar quarter in which the employer had the highest number of employees.

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Disability Insurance

California State Disability Insurance (SDI) is a partial wage-replacement insurance plan for California workers. The SDI program is state-mandated and funded by employee payroll deductions. SDI provides affordable, short-term benefits to eligible workers who suffer a loss of wages because they cannot work due to an illness or injury that is not work-related, or a medically-disabling condition resulting from pregnancy or childbirth.

Payroll deductions for all covered workers are based on the same contribution rate.

Benefits of California SDI Coverage:

1. SDI coverage "travels" with the worker. Coverage is not dependent on staying with a specific employer.
2. SDI coverage is mandatory for most California workers.
3. SDI is non-exclusionary. An eligible worker's coverage cannot be canceled or denied because of

health risk factors, pre-existing medical conditions, or hazardous employment.
4. SDI may pay up to 52 weeks of benefits with a waiting period of only seven days.

Employers are required to provide a new employee with a SDI pamphlet. See page 67 for more information.

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Child Labor

California and federal laws regulate the conditions under which minors may be employed and the hours they may work. The employment of minors in some situations is completely banned.

Work Permits

An employer that directly or indirectly employs a minor under 18 years of age (other than a high-school graduate or equivalent) must keep a "Permit to Employ" and a "Work Permit" on file throughout the minor's employment. The Permit to Employ must be obtained before the minor starts work. Minors apply for Work Permits from the minor's school. Minors visiting from another state (or country, if eligible to work in the United States) who wish to work in California must obtain the standard Permit to Employ and Work, and their employers must possess such permit. These permits may be issued by the local school district in which the minor will reside while visiting.

Agricultural Zone of Danger

Minors under 12 may not work or accompany an employed parent into an "agricultural zone of danger," which includes being near moving equipment, unprotected chemicals or water hazards. Minors under 16 may not perform hazardous duties.

Minors employed on a farm owned or operated by their parents or guardians are not subject to minimum wage, overtime, or working-condition requirements. While not needing work permits, they may not work during hours that school is in session.

Child Labor Summary

Here is a summary of child-labor requirements on California farms and in agriculturally-related workplaces:

Exemption for One's Own Children: A minor of any age (even under age 12) may be employed without either a permit or any limitation in agricultural, horticultural (including fruit curing and drying but not canning), viticultural and domestic labor for or under the control of his or her parent or guardian upon or in connection with premises owned or operated by the parent or guardian. This exemption applies only during nonschool hours and even if the minor is under school age.

In a nonagricultural workplace operated by a grower (*e.g.*, a packinghouse where the commodities being handled were produced by that grower and other growers) a minor is exempt from federal Fair Labor Standards Act (FLSA) coverage only if the minor's parent or guardian is the exclusive employer; where such an operation is a partnership or corporation, a minor is exempt from FLSA coverage only if the minor's parents or guardians are the sole partners or shareholders. (A minor employed in such a workplace is exempt under California law as long as the conditions stated in the above paragraph exist.)

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Minimum Age Standards Generally:

> **Minors aged 14 through 17**: May work in any job except those listed for their respective age bracket under **Restricted and Hazardous Occupations**, below.
>
> **Minors aged 12 and 13**: May not work in FLSA-covered nonagricultural jobs (*e.g.*, commercial processing operations). May work, with either written parental consent or on a farm where the

minor's parent or person standing in the parent's place is also employed, in any agricultural job except those listed for their age bracket under **Restricted and Hazardous Occupations**, below.

Permits to Work and to Employ: Required unless minor is a high-school graduate or has a certificate of proficiency. Minor obtains permits from school district where minor resides or attends school. Permits must be available for inspection by state labor-law and local and state school authorities.

Record Keeping: In addition to regular requirements for maintaining employment records, an employer must keep for 3 years a record of the birthdate of one who was a minor when hired; copy of work permit is acceptable.

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Hours of Work:

Exception: High-school graduates and those with a certificate of proficiency may work same hours as adults.

Minors aged 16 and 17: When school is in session, may work 4 hours on school days and 8 hours on nonschool days; with special permission may work 8 hours on school days before nonschool days.
When school is not in session, may work 8 hours per day and 48 hours per week.
Exception: May work 10 hours per day on nonschool days during peak harvest season in an agricultural packing plant to which the Labor Commissioner has issued an exemption.

Minors aged 14 and 15: When school is in session, may work 3 hours per day and 18 hours per week.

When school is not in session, may work 8 hours per day and 40 hours per week.

Minors aged 12 and 13: May work only in agriculture for 8 hours per day and 40 hours per week on nonschool days only.

Spread of Hours:

Minors aged 16 and 17: May work between 5 a.m. and either 10 p.m. on school days or 12:30 a.m. on nonschool days.

Minors aged 14 and 15: May work between 7 a.m. and 7 p.m., but from June 1 to Labor Day may work until 9 p.m.

Minors aged 12 and 13: May work only in agriculture between 7 a.m. and 7 p.m., but from June 1 to Labor Day may work until 9 p.m.

Restricted and Hazardous Occupations:

All minors: No minor may be employed in: explosives manufacturing and storing; motor-vehicle driving and outside helping on public roads; mining; logging and sawmilling; power-driven woodworking, metal forming, punching, shearing, hoisting-apparatus, bakery, paper-products, and sawing machine operations; jobs involving exposure to radioactive substances; slaughtering; meat packing, processing and rendering; brick and tile *(etc.)* manufacturing; wrecking, demolition and ship-breaking; roofing; excavating; certain jobs in gasoline service stations selling or serving alcoholic beverages; or handling pesticides.

Minors aged 12 through 15: No minor under age 16 may be employed in: manufacturing or processing (*e.g.*, cracking nuts, dressing poultry) **occupations or workplaces**[1]; public messenger services; transporting persons; warehousing; communications; construction; certain work in retail or food-service businesses; automobile or truck driving; operating a tractor of over 20 PTO, or connecting or disconnecting implements to or from such a tractor; operating or otherwise physically

contacting these machines--corn or cotton picker, grain or potato combine, hay mower, forage harvester, hay baler, potato digger, mobile pea viner, power post-hole digger, power post driver, nonwalking-type rotary tiller, trencher, earthmoving equipment, forklift, or power-driven saw; near a bull, boar or stud horse, or a sow with suckling pigs or cow with newborn calf (with umbilical cord); working on a ladder at a height of over 20 feet, or on any scaffolding; felling, bucking, skidding, loading or unloading timber over 6 inches thick; riding on a tractor; oxygen-deficient or toxic-atmosphere fruit, forage or grain storage facility; certain silos; manure pits; handling explosives or anhydrous ammonia; adjusting, sewing or lacing machinery belts; oiling, wiping or cleaning machinery; **near moving machinery**[2]; and certain other hazardous jobs.

[1] Exception: May work subject to the restrictions listed above in noncommercial *agricultural* processing/ packing of only the grower's own commodities (*i.e.*, where the commodities being handled were produced by only the grower/processer/packer employing the minor).

[2] The restriction on working near moving machinery means that minors may not work "in harm's way" of *any* moving machinery; the restricted activities involving moving machinery listed in this section (which are specified in various laws and regulations) should thus be regarded as examples and not as an exhaustive listing of such activities or machinery that minors under age 16 must avoid.

Posting of Notice: Farms employing any parent or guardian with minor children in immediate custody must post a notice, in English and Spanish, stating that minors are not allowed to work on the premises unless legally permitted to do so by duly-constituted authorities.

Wages: Generally, minors must be paid wages on same basis as adults. Employers may pay a sub-minimum wage to adult and minor employees who qualify as “learners” as specified under IWC Orders. See “Learners” under “Minimum Wages” on page 17.

Citations and Penalties: Citations may be issued for violations.

A "Class A" citation is issued for violations of Labor Code §§ 1292, 1293, 1293.1, 1294, 1294.1, 1308, and 1392, and for others which present an imminent danger to minor employees, or a substantial probability that death or serious physical harm would result therefrom. A civil penalty of at least $5,000 and up to $10,000 is imposed for each Class A violation.

A "Class B" citation is issued for violations of Labor Code §§ 1290, 1299, 1308.5 and for others which have a direct or immediate relationship to the health, safety, or security of minor employees. A civil penalty of at least $500 and up to $1,000 is imposed for each Class B violation.

These penalties may be imposed on a landowner who knowingly benefits from child-labor violations, regardless of whether the landowner is the minor's employer.

Posting Requirement: The posting requirement is reviewed in the section “Employment of Minors” on page 67.

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Transportation and Housing

Transportation of Employees

Two federal laws regulate the transportation of employees: the Interstate Commerce Act (ICA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). The transporting of non-agricultural employees is not covered by either of these acts. However, several regulations of the federal Occupational Safety and Health Administration cover the transportation of employees. Since California has an agreement to administer OSHA standards, these provisions will be reviewed in this section under the Cal/OSHA standards. The California Vehicle also regulates vehicles which transport employees.

In addition laws that regulate the safe transportation of workers there are also provisions that regulate wage and hour issues which is reviewed in the Wage and Hour section of this Guide starting on page 17.

Below are the provisions regulating the transportation of employee:

Interstate Commerce Act (ICA) Regulations: Section 204(3a) of the ICA regulates the transportation of farm workers by motor vehicle. The ICA is administered by the Federal Motor Carrier Safety Administration, a unit of the U.S. Department of Transportation (DOT).

The ICA exempts from regulation the transportation of farmworkers where such transportation is:

— By a common carrier
— Within the boundary of one state
— For any distance of less than 75 miles
— By automobile or station wagon
— By a person transporting members of his or her own family

Regulations on the transportation of farm workers are designated as Part 398 of Title 49 of the Code of Federal Regulations. A copy may be obtained from the Federal Motor Carrier Safety Administration, 201 Mission Street, Suite 2100, San Francisco CA 94105 (telephone: 415-744-3088).

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Migrant and Seasonal Agricultural Worker Protection Act (MSPA): By regulation, the U.S. Department of Labor (DOL) has adopted the DOT's rules, as noted above, plus additional provisions for other transportation covered by the MSPA.

Where the agricultural employer or FLC "uses or causes to be used" a vehicle for the transportation of a migrant or seasonal agricultural worker (no matter who is operating it), then the MSPA's transportation provisions apply. This can occur where the agricultural employer or FLC (or a supervisor) tells only workers with vehicles who give other workers rides—rather than telling every worker—where to report for work the next day (or later in the same day where workers move from field to field). In that type of situation, the agricultural employer or FLC becomes responsible for ensuring compliance with the MSPA's transportation provisions.

In contrast, agricultural employers and FLCs may, without subjecting themselves to the MSPA's transportation provisions, encourage workers to make carpooling arrangements among themselves. Also, workers may ride with crew leaders as long as the agricultural employer or FLC has no part in the arrangement and the crew leader is simply another employee and not an agent of the employer (as are supervisors and foremen). A carpooling arrangement does not exist, however, where a foreman or supervisor is involved in the transportation arrangement.

FLC Transportation of Workers: The DOL identifies on an FLC's certificate of registration the maximum number of workers the FLC may transport and requires proof of adequate insurance and compliance with vehicle safety standards.

An FLC must identify each vehicle to be used, or caused to be used, for the transportation of any migrant or seasonal agricultural worker during the period for which registration is sought. The FLC must provide written proof that every such vehicle which is under the FLC's ownership or control complies with MSPA's vehicle safety and insurance requirements.

Here is a summary of the MSPA regulations on the transportation of covered agricultural workers by the type of vehicle used:

Vehicles covered under regulations developed by DOL: These vehicles must comply with the regulations developed by the DOL (see "Vehicle Safety Regulations Developed by DOL" below):

1. Passenger automobiles and station wagons used to transport covered workers.

2. Vehicles other than passenger automobiles or station wagons (*e.g.*, vans or buses) used to transport covered workers less than 75 miles round trip.
3. Pickup trucks used only for transportation when transporting passengers only within the cab.

Exempt vehicles: These vehicles are not subject to the vehicle safety standards under the MSPA:

1. Agricultural machinery and equipment while performing planting, cultivating, or harvesting activities, while being used in the care of livestock, and transportation which is incidental to these activities.
2. The vehicle of an individual worker when the only other passengers are members of the worker's immediate family.
3. Carpooling arrangements. The DOL says a bona fide carpooling arrangement is one that:
   a. is voluntary among the workers and uses one or more of their vehicles;
   b. yields for the worker providing the vehicle no more than the cost of its operation;
   c. is not specifically directed or requested by an agricultural employer, farm labor contractor (FLC) or agricultural association; and
   d. does not include an FLC as a participant.

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Rules Which Apply to All Vehicles: These regulations apply to any vehicle when transporting workers.

1. Any vehicle used to transport workers must meet applicable vehicle safety standards prescribed by the Secretary of Labor and by other federal and state agencies.
2. A driver of any vehicle transporting workers must have a valid motor vehicle operator's license.
3. Where an agricultural employer or association specifically directs or requests an FLC to use the FLC's vehicle to do a task, such direction constitutes a joint responsibility with the FLC for assuring that the vehicle meets the MSPA's insurance and safety provisions.

Vehicle Insurance Requirements: Except where an approved liability bond is established or the transportation of workers is fully covered by workers' compensation insurance, an FLC, agricultural employer or agricultural association must purchase and maintain liability insurance coverage for any vehicle used to transport migrant or seasonal agricultural workers. The policy liability limits must be in an amount of at least $100,000 for each available seat, subject to a limit of $5 million.

Insurance against damage to or loss of property of others must also be maintained. The policy must provide at least $50,000 coverage for loss or damage in an accident. An employer of migrant or seasonal agricultural workers that does not obtain liability insurance, but instead relies on its workers' compensation insurance to cover them for bodily injury or death, still must obtain this insurance.

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Vehicle Safety Regulations Developed by the DOL: Vehicles covered by regulations developed by the DOL must meet specific safety standards. Generally these standards are similar to the regulations governing the equipment for passenger vehicles under the California Vehicle Code. Here is a summary of the equipment covered by DOL regulations:

1. External lights, brakes, tires, steering, horn, mirrors, windshield/windshield wipers, fuel system, exhaust system, and handles/latches.
2. Ventilation: windows must be operational.
3. Loading of vehicles not to exceed manufacturer's gross weight rating.
4. A seat fastened to the vehicle must be provided for each rider, except where transportation is primarily on private farm roads and the trip is less than 10 miles. One trip may have numerous stops.
5. Passenger compartments must be free of openings, rusted areas or other defects that are likely to result in injury to riders.

A copy of the DOT standards adopted by the DOL may be obtained from district offices of the DOL's Wage and Hour Division (WHD). When requesting them, specify 29 CFR Part 500.105. They are also available online at http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_500/29CFR500.105.htm.

State Statutes and Regulations: California laws regulating the transportation of employees are found mainly in the Vehicle Code (VC) and Cal/OSHA General Industry Safety Orders.

Farm Labor Vehicles: A vehicle designed, used or maintained for the transportation of nine or more farmworkers in addition to the driver is a farm labor vehicle. A farm labor vehicle must be inspected annually by the California Highway Patrol (CHP).

A Vehicle Inspection Certificate must be displayed in the farm labor vehicle. Contact the CHP for an inspection.

As required by law, the California Department of Motor Vehicles developed specifications for a display sticker that must be clearly displayed on every farm labor vehicle. The display sticker lists the inspection certification date and the "800" telephone reporting system required by California Vehicle Code Section 2429.

Every farm labor vehicle must be identified as follows:

(1) Markings.

(A) The words "FARM LABOR VEHICLE" shall be displayed on each side of each farm labor vehicle in uppercase lettering on a sharply contrasting background. Letters shall be a minimum of 1.5 inches in height and clearly legible from a distance of 50 feet during daylight hours.

(B) The words "TO REPORT VIOLATIONS" in uppercase characters and the toll-free telephone number "1-800-TELL CHP" must be displayed on the exterior on each side of each farm labor vehicle on a sharply contrasting background. Characters must be a minimum of 1 inch in height and may be displayed on one or two lines.

(2) Interior Notice. A farm labor vehicle notice in English and Spanish, furnished by the CHP, must be displayed in the interior of each farm labor vehicle in a location visible to the passengers. The required notice, Farm Labor Vehicle Notice, CHP 408C (New 12-99), must be completed by an authorized CHP employee to indicate the maximum number of passengers the vehicle may to transport and the vehicle license number. The notice must also advise the reader of the toll-free CHP telephone number where violations relating to the operation of farm labor vehicles may be reported.

For other requirements, see page 51.

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Vehicle Inspections: Vehicles, even vehicles other than Farm Labor Vehicles, used by an FLC to transport employees must be inspected. Either DOL Form 514a (for passenger cars or station wagons) or Form WH-514 (for all other vehicles) must be completed for each vehicle. See appendix page ?.

Vehicle Drivers: Drivers of any vehicle must possess the appropriate licence for the vehicle driven. The driver of a farm labor vehicle must hold a Class B license with a farm labor vehicle driver endorsement. The driver must take and pass a farm labor vehicle course approved by the Department of Education and obtain a medical certification before being licensed as a farm labor vehicle driver. Further, Class B drivers are subject to the Department of Motor Vehicles (DMV) Employer Pull Notice Program. Obtain registration information and forms at any DMV office. Or, write or call:

Department of Motor Vehicles
DL Information Service Unit
PO Box 944231
Sacramento, CA 94244
(916) 657-6346

or obtain information and forms on the Internet by visiting:
http://www.dmv.ca.gov/vehindustry/epn/epnformlist.htm

Farm Labor Vehicles: A farm labor vehicle (FLV) is any motor vehicle (including a bus) designed, used, or maintained for the transportation of nine or more farmworkers, in addition to the driver, to or from a place of employment or employment-related activities. A vehicle carrying only members of the immediate family of the owner or driver, or a vehicle regulated by the state Public Utilities Commission, is not an FLV. (VC § 322.)

An FLV driver must possess a class B driver license and a certificate issued by the Department of Motor Vehicles and a medical certificate issued within the past two years. (VC §§ 12519 & 12804.9(b)(2)(D).) For other requirements, see page 51.

Farm Labor Vehicle Equipment: Here is a brief summary of the equipment that an FLV must have. For more detailed information, see title 13, California Code of Regulations, section 1242 et seq. These regulations may be viewed by accessing the regulation search page on the Web site of the California Office of Administrative Law at http://ccr.oal.ca.gov/Templates/CCR/Sectem.htm. Except where otherwise noted, the section numbers cited below refer to that source.

1. **Seats**: The driver's seat must be positioned so he sits in a natural position, has a clear view ahead, a clear view of mirrors, and adequate leg room for operation of foot controls. The seat must be adjustable, and the adjustable parts must be secured with a locking device. (§ 1270(a).)

   Seating accommodations for each passenger must provide a space with a depth of at least 10 inches, a width of 16 inches, and a height (measured from the floor) of 15-19 inches for the seat and 32 inches for the top of the seatback. Aisles between facing seats must be at least 24 inches wide. Headroom, measured from the ceiling to the top of the cushion at least 7 inches from the interior side wall, must be at least 39 inches (except for seats installed by the original chassis manufacturer). Each seat cushion must be fastened to the seat frame by at least two positive locking devices at the front or rear of the cushion.

   The passenger compartment must be enclosed to a height of at least 46 inches or equipped with other equally-effective means to prevent passengers from falling off the vehicle. Seat frames and backs must be rigidly constructed and maintained to ensure structural safety and resistance to displacement of any component in the event of an accident. For the purpose of establishing passenger capacity, weight per person is calculated at 150 pounds. (§ 1270(c).)

   All passenger seating positions in an FLV must meet federal motor vehicle safety standards—that is, they must have properly-installed forward-facing seating that meets or exceeds the vehicle manufacturer's specifications. (VC § 31406.)

2. **Seatbelts**: An FLV must be equipped with a seatbelt assembly complying with federal motor vehicle safety standards at each passenger position. (VC §§ 27315 & 31405.) Exception: A bus (see definition below) meeting all federal and state standards that is used as an FLV is exempt from this requirement until 2007, at which time it must, unless exempted under regulations issued under VC section 31401, have a seatbelt assembly at each passenger position. (VC § 31405é)(2).)

3. **Fire Extinguisher**: An FLV must carry a fully-charged fire extinguisher, with UL label and at least a 4B:C rating. (§ 1242.)

4. **First-Aid Kit**: An FLV must carry a 10-unit first-aid kit that is readily visible, accessible and plainly marked. Its contents must be protected from dirt and moisture. (§ 1243.)

5. **Spare tires** must be securely mounted on an FLV by tire carriers or other means. (§ 1244.)

6. **Brakes** must comply with the provisions of title 13, California Code of Regulations, section 1245. A bus may have a manual or automatic device for reducing braking effort on the front wheels. The manual means may be used only when operating on roads with adverse conditions, such as wet, snowy, or icy roads. (VC § 26311(b).)

7. **Towing equipment** must be maintained in good condition. The lower half of a fifth wheel must be securely fastened to the frame with U-bolts to prevent it from shifting on the frame. (§ 1247.)

8. **Fuel systems** must be free of leaks, securely mounted, and properly supported to minimize

vibration, and have other than gravity feed. Containers must be sealed by a cap or plug of non-combustible material. (§ 1253.)

9. **Ventilation** must be adequate for any weather condition. Ventilator openings must be screened. (§ 1260.)

10. **Exhaust systems** must minimize entry of gases into passenger compartment. Discharge must be below passenger compartment and beyond the rear or side of the body, but not near any exit, entrance, or window. (§ 1261.)

11. **Speedometer and odometer** must maintained in good working condition, visible to driver, and illuminated at night. (§ 1262.)

12. **Operator identification** must be displayed on both sides of the FLV and legible from a distance of 50 feet. (§ 1256(c).)

13. **Interior lights** must be on buses operated at night. (§ 1263.)

14. **Passenger compartment**, if separated from driver, must have a means to get driver's attention, such as a buzzer or other signaling device. (§ 1264.)

15. **Entrances and exits**: Buses manufactured after September 1, 1973, must meet federal manufacturing standards in effect at the time. Buses manufactured before that date must be equipped with at least one emergency door on the left side of vehicle and behind the driver, or an emergency door on the rear center of the bus, or escape windows of the push-out type. See regulation for other requirements, including signage. (§ 1268.)

16. **Tool and Equipment Storage**: Cutting tools or tools with sharp edges carried in the passenger compartment of a farm labor vehicle must be placed in securely-latched containers that are firmly attached to the vehicle. All other tools, equipment and materials carried in the passenger compartment must be secured to the vehicle and may not obstruct an aisle or emergency exit. (VC § 31407.)

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Pickup, Flatbed and Dump Trucks Except for the situations noted below, no person may ride in or on the back of a pickup truck or flatbed motortruck on a highway. Similarly and subject to the same exceptions, no person driving a pickup or flatbed truck on a highway may transport anyone in or on the back of the truck. (VC section 23116.)

Exceptions: A person may ride in or on the back of a pickup or flatbed truck if the person is:

1. Secured by a restraint system that conforms to federal motor vehicle safety standards.
2. Being transported in the back of a truck or flatbed motortruck owned by a farmer or rancher, if that vehicle is used exclusively within the boundaries of lands owned or managed by that farmer or rancher, including the incidental use of that vehicle on not more than one mile of highway between one part of the farm or ranch to another part of that farm or ranch;
3. Being transported in an emergency response situation (i.e., where measures must be taken to prevent injury or death to persons or to prevent, confine or mitigate damage or destruction to property) by or pursuant to the direction or authority of a public agency; or
4. Being transported in a parade that is supervised by a law-enforcement agency, and the speed of the truck while in the parade does not exceed eight miles per hour.

Trucks: Trucks used primarily or regularly for the transportation of workers must have:

1. Seats securely fastened to the vehicle;
2. If a motortruck, a railing or other suitable enclosure on the sides and end of the vehicle extending at least 46 inches above the floor of the vehicle; and
3. Steps, stirrups, or other equivalent devices so placed and arranged that the vehicle may be safely

mounted and dismounted. (VC § 34100.)

Carrier or Employer Responsibility: These duties are specified in sections 1229 to 1232 of Title 13 of the California Code of Regulations:

1. The responsible employer or operator must ensure that the driver is properly certificated and capable of safe operation of the vehicle and may not knowingly permit driving in violation of statutes or regulations.
2. The responsible employer or operator must also ensure that the vehicle is properly equipped and is in safe operating condition.
3. A vehicle damaged in an accident shall not be moved until inspected by a qualified person.
4. A vehicle designated as “out-of-service” by a law enforcement official shall not be operated until repaired.
5. Vehicles must be annually inspected by the California Highway Patrol (CHP). A “Vehicle Inspection Approval Certificate” issued by the CHP must be displayed in a visible certificate holder in each vehicle.
6. The employer must arrange for periodic safety checks, adequate preventative maintenance procedures, receipt of driver reports, action to correct deficiencies reported, and records of service provided.

The owner or any other person employing or otherwise directing the driver of any vehicle may not cause the vehicle to be operated upon a highway in any manner contrary to law. (VC § 40001(a).)

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Cal/OSHA: Cal/OSHA regulates the transportation of employees when transported exclusively on private property. Under Cal/OSHA General Industry Safety Order sections 3700-3703 (found in title 8, California Code of Regulations), one may drive a vehicle while transporting workers only if he holds a valid operator’s license for the appropriate class of vehicle being driven.

The General Industry Safety Orders issued by Cal/OSHA specify the equipment for vehicles used to transport employees. GISO section 3702(q) allows employees to be transported in the back of a flatbed, pickup, or dump truck as long as:

1. The employees sit on the truck bed;
2. Barriers or guardrails around the perimeter of the truck bed prevent employees from falling;
3. Pickup tailgates are closed or an equivalent closure is provided;
4. If a dump truck, the body is secured or the hoist lever is locked, and tailgate is closed; and
5. Employees do not ride on the top of side rails, the top of the cab, running boards, fenders, the hood, or with their legs hanging over the end or sides.

EXCEPTION: One or two employees may be permitted to ride on the bed of a truck that does not comply with 2, 3, and 4 above as long as they stand or sit immediately behind the cab, holding on to suitable grabirons that are rigidly fastened to the truck.

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Liabilities Relative to Transportation: Accidents involving employees while commuting between home and the workplace in their own vehicles can sometimes create certain liabilities.

Generally, under California law, employees are entitled to workers’ compensation benefits as the exclusive remedy for injuries and illnesses that arise from their employment and are sustained in the course of that employment.

As a general rule, an injury incurred by an employee while going to work from home or while coming home from work is not covered by workers’ compensation law. However, exceptions exist to this so-called going-and-coming rule.

One such exception of special note to agricultural employers is where, to get the job done, employees must bring their own vehicles to work or ride in co-workers' vehicles during the workday. This exception applies whether the requirement is directly imposed by the employer or is merely implied due to workplace circumstances.

Consider, for example, a situation where employees must move between ranches during the workday. The ranches are so far apart that employees must travel in vehicles between them. The employer does not provide the necessary transportation, leaving it to the employees themselves to get from one ranch to another. One day, an employee is injured while riding home in a co-worker's car from one of the ranches.

In its 1972 decision in *Hinojosa* v. *WCAB*, the California Supreme Court ruled that an employee injured in these same circumstances was entitled to workers' compensation benefits. By failing to provide transportation between the ranches, the employer implicitly required his employees to bring vehicles to work each day and drive them home afterward. In such a case the duties of employment extend beyond the employer's premises, make the vehicle a required part of the employment, and compel the employee to submit to the hazards associated with private motor travel, which the employee would otherwise have the option of avoiding.

Another exception to the going-and-coming rule is where an employee is performing a "special mission" directed by the employer on the way to work or while returning home from work. To fall within the exception, the mission or errand must be "substantial," meaning one requiring the employee to commute at a time different from the normal commute time.

For example, suppose an employee is told to drive to town to pick up supplies before reporting to work. The employee would be covered for workers' compensation purposes while traveling from home to town and then on to work.

Moreover, an employer could be held liable for injuries to third parties caused by an employee in these situations. Adequate non-owned vehicle liability insurance coverage can help protect an employer from such liability.

An agricultural employer that uses, or causes to be used, a vehicle to transport a migrant or seasonal agricultural worker must ensure that the vehicle conforms to vehicle safety and insurance standards issued under the federal Migrant and Seasonal Agricultural Worker Protection Act (MSPA) and to other applicable laws. An agricultural employer must also ensure that the driver of any such vehicle has a valid license to operate the vehicle.

In contrast, carpooling arrangements are beyond the MSPA's scope. To qualify, a ridesharing arrangement must: 1) be voluntary among the workers using the workers' own vehicles; 2) yield for the person providing the vehicle no more than the vehicle's operating cost; 3) not be specifically directed or requested by an agricultural employer; and 4) not include a farm labor contractor as a participant. Otherwise, the vehicle operator is a farm labor contractor, according to a U.S. Department of Labor (DOL) regulation.

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Transportation Provided by Supervisors: Supervisors who give employees rides to and from work in their own vehicles create several potential problems.

The first problem arises where the supervisor requires employees to ride with him and to pay for the rides. This is a kickback; in Spanish, it is called *mordida* (the bite). It is a violation of state law to require an employee to pay anything of value to be hired or remain employed. Since the supervisor is the employer's agent, the employer would be liable for the violation.

A second concern would be injuries to third parties while transporting employees. The employer would be liable for an accident caused by the supervisor's negligence.

A third concern is meeting the vehicle safety, insurance requirements and driver qualification requirements the MSPA imposes for employee transportation. Especially where an employer is unaware that a supervisor is transporting employees, the employer can't monitor the supervisor's activities.

Finally, if employees must ride with their supervisor, then the time spent traveling to and from work must be compensated.

Transportation Provided by Farm Labor Contractors: Growers using the services of a farm labor contractor (FLC) must make sure the FLC is registered as an FLC under the MSPA and licensed as an FLC under California law.

Where the FLC is transporting workers, the grower must check that the FLC is authorized to do so. The DOL identifies on an FLC's certificate of registration the maximum number of workers the FLC may transport and requires proof of adequate insurance and compliance with vehicle safety requirements.

A grower who uses the services of an FLC can be held responsible for the FLC's actions if it can be shown a joint-employment relationship exists between them. The applicable DOL regulation imposes an "economic dependency" test to determine the existence of joint employment. Under this test, since the grower provides the land, the crop, and often tools and equipment to do the work, then the FLC's employees are in reality dependent on the grower for their jobs. In many cases the DOL will therefore insist the grower is a joint employer of the FLC's employees and thus liable for the FLC's violations.

A grower considering using an FLC should therefore review the FLC's business practices before engaging the FLC to improve the chances of hiring an FLC who will comply with legal requirements.

Given all these concerns, growers should review or develop worker-transportation policies and inform employees—especially supervisors—about them.

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Housing

State Coverage: The summary of California requirements is based on the state Health and Safety Code (HSC), Division 13, Part 1, Sections 17000 through 17062 (the Employee Housing Act), the state Code of Regulations (CCR), Title 25, Division 1, Chapter 1, Sections 600 through 940, and the CCR, Title 24. Other California statutes and regulations not referenced may also apply to employee housing.

With some exceptions, the Employee Housing Act applies to two types of employee housing: (1) living quarters provided for five or more employees by the employer; and (2) housing accommodations or structures in specified rural areas provided for five or more agricultural workers employed on a temporary, seasonal, or permanent basis, not maintained in connection with any workplace.

Cal/OSHA Requirement: Section 3350 of Title 8 of the California Code of Regulations (CCR) requires every employer operating employee housing under the provisions of the Employee Housing Act to obtain a permit issued by the Department of Housing and Community Development or by any authorized local governmental agency. The employer must post or have available a valid and current permit.

Fees for Permits and Inspections: Permit Fees (Title 25, CCR § 637) - Every person applying for a permit exemption for employee housing on a dairy farm, or for a permit to operate employee housing, must pay fees to the enforcement agency for an exemption or a permit to operate in accordance with the following:

1. Fees for a permit to operate employee housing are:

    a. Issuance fee of $35.
    b. Permit to operate fee of $12 for each employee whom the operator intends to house, and $12 for each lot or site provided for parking of mobilehomes or recreational vehicles by employees.
    c. Amended permit fee of $20 for any transfer of ownership or possession.
    d. Amended permit fee of $20 and fees as specified above for any increase in the number of employees to be housed and additional lots or sites provided for parking of mobile homes or recreational vehicles by employees.

2. Fees for an exemption are:

   a. Issuance fee of $35.
   b. An exemption fee of $12 for each permanent housing unit.
   c. Amended exemption fee of $20 for any transfer of ownership or possession.
   d. Amended permit fee of $20 and fees as specified above for any increase in the number of permanent housing units.

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Prohibitions: No person operating employee housing may terminate or modify a tenancy by increasing rent, decreasing services, threatening to bring or bringing an action to evict, refusing to renew a tenancy, or in any other way intimidating, threatening, restraining, coercing, blacklisting, or discharging an employee or tenant because of the tenant's exercise of any legal right under the Employee Housing Act. H & S Code §§ 17031.5 and 17031.7.

Federal Coverage: The summary of federal requirements is derived from regulations under the Occupational Safety and Health Act (OSHA) at Title 29, Code of Federal Regulations (CFR) Part 1910.142, and under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) at Title 29, CFR Part 500. Housing constructed after March 1980 is subject to those OSHA regulations. One who owns or controls housing constructed before April 1980 may elect to comply with either those OSHA regulations or with the standards issued by the Employment Training Administration at Title 29, CFR 654.404 et seq.; those standards are not summarized here.

The MSPA and regulations under it protect migrant and seasonal agricultural workers in their dealings with farm labor contractors (FLCs), agricultural employers and agricultural associations. However, it regulates only migrant (not seasonal) agricultural worker housing. The MSPA applies to housing even if only one migrant agricultural worker lives there.

Penalties: Penalties for violating the state Employee Housing Act are extremely harsh. Violators are subject to civil and criminal penalties, including fines and imprisonment. Depending on the circumstances, they range from a minimum civil penalty of $300 and, for a continuous repeat violation, go up to $6,000 per day. Criminal penalties range from $2,000 to $6,000 and imprisonment of up to 180 days, or both. Violators also must pay the other party's reasonable costs and attorney's fees. A repeat violator may even be ordered to be confined for up to one year in the employee housing at issue and to pay up to $2,000 for a guard to enforce and monitor the confinement! H & S Code §§17061-17061.9.

A civil fine of up to $1,000 may be imposed for each violation of the federal Migrant and Seasonal Agricultural Worker Protection Act's housing provisions. 29 USC §1853á).

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Agricultural Labor Relations Act (ALRA)

In 1975, the California State Legislature passed the Agricultural Labor Relations Act. The purpose of the Act is to ensure peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations." The Act states that it is the policy of the State of California to encourage and protect the right of farm workers to act together to help themselves, to engage in union organizational activity and to select their own representatives for the purpose of bargaining with their employer for a contract covering their wages, hours, and working conditions.

The law prohibits the employers from interfering with these rights, protects the rights of workers to be free from restraint or coercion by unions or employers, and it prohibits unions from engaging in certain types of strikes and picketing.

Agricultural Labor Relations Board (ALRB)

The Agricultural Labor Relations Board is the agency that administers the ALRA and protects the rights of agricultural employees in various ways. For example, the ALRA creates a method by which workers may

select a union or other representative to bargain with their employer if they wish. Agents of the Board conduct secret-ballot elections to determine whether workers wish to be represented and if so, by whom. Also, the ALRA gives authority to the ALRB to investigate, process and take to trial employers or unions who engage in actions which the Act describes as “unfair labor practices” (ULPs). When Board employees conduct an investigation and obtain enough evidence to show that an unfair labor practice has been committed, a “complaint” is issued and a hearing is held at which each party has a right to present its side of the case.

The ALRA guarantees the rights of employees to engage in, or to refrain from, union activities or “concerted activities,” such as acting together to help or protect each other in matters related to their employment, including their wages, hours or working conditions. Actions by an employer or a labor organization that prevent employees from exercising their free choice in a Board election may result in setting aside the election and conducting a new election. Such actions may also be unfair labor practices.

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Coverage under the ALRA

The Agricultural Labor Relations Act applies only to agricultural employers, agricultural employees and labor organizations which represent agricultural employees. Those who are not engaged in agriculture and are not agricultural employers are not touched by the ALRA.

Definitions

Agricultural Employer: The term “agricultural employer” includes any person, association or group engaged in agriculture, and any person acting directly or indirectly in the interests of such an employer, or of any grower, cooperative grower, harvesting association, hiring association or land management group.

Farm Labor Contractors: An agricultural employer is responsible for the acts of its supervisors or other persons with supervisory authority over employees. When a farm labor contractor is engaged by an agricultural employer, the employer is responsible for the acts of the labor contractor, its foreman, other supervisors and any other agents acting on his/her behalf.

Supervisors: A supervisor is defined in the ALRA as . . . “any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or the responsibility to direct them or to adjust their grievances or effectively to recommend such actions.” In most circumstances, supervisors are not entitled to the rights and protections set forth in the ALRA.

Agricultural employees: Agricultural employees, as defined in the ALRA, are those engaged in agriculture or in functions that a farmer performs as an incident to or in connection with farming operations. For example, an office clerical employee or a bookkeeper is an agricultural employee if he or she keeps records or books that are incidental to a farming operation.

Unions: The ALRA defines a union or labor organization as any organization or group in which employees participate and which has a purpose of dealing with employers about grievances, labor disputes, wages, hours, and working conditions of agricultural employees. Although labor organizations are responsible for the acts of their agents and employees, an agricultural employee does not become an agent of a labor organization merely by joining or supporting the union.

Here are some terms used in the ALRA and in this Guide, along with definitions and some explanatory comments.

Concerted Activities: Conduct by two or more employees, acting together, for mutual aid and protection. The ALRA protects such activities even if they do not involve union membership or activity.

Unfair Labor Practice: Any action by an employer or a labor organization that has the effect of restraining or coercing employees in the exercise of their rights guaranteed by the ALRA. An unfair labor practice can be committed by anyone who the law considers an agent of a union or employer.

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Union Elections

Labor Code section 1152 gives farm workers these rights: to unite and campaign for a union; to elect a representative by secret ballot to speak for all employees with management about wages, hours and working conditions; to have their representative recognized by management as the bargaining agent and be dealt with in good faith; to act together without interference or discrimination to solve the problems faced by farm workers; and to refrain from any or all of these activities. The secret-ballot election is the first step in this guarantee and protection for the exercise of workers' rights. By casting individual votes in a secret-ballot election, farm workers choose whether they wish to be represented by a labor organization in bargaining with their employer.

Union Access

To make an intelligent choice, employees must have access to information and the opportunity to hear both sides in an election campaign. The ALRB's access regulation is meant to ensure that farm workers, who often may be contacted only at their work place, have an opportunity to be informed with minimal interruption of working activities. The ALRB regulates and enforces these rights by setting certain hours and times when representatives of labor organizations may be present on the employer's property: one hour before and after work, and one hour during the lunch break. The ALRB has limited the number of organizers to two for each crew of 30 or fewer, three for each crew of 3l to 45, four for each crew of 46 to 60, and so on. A labor organization may take access for only four 30-day periods in a single year.

A labor organization wanting to take access must complete a form, called a Notice of Intent to Take Access, and delivers a copy of it to the employer's office or to its manager or one of the supervisors. The union then files the notice at the nearest ALRB office. Once the notice is filed, the employees have a right to meet with, talk to, and receive literature from union organizers at their work site during the hours already mentioned.

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Unfair Labor Practices

The purpose of establishing an Unfair Labor Practice (ULP) procedure is to prevent employers and unions from interfering with, restraining or coercing farm workers in the exercise of their rights as granted by the ALRA.

Under the ALRA, it is the exclusive right of employees to decide whether they wish to be represented by a union. In an effort to ensure an atmosphere free from threats, coercion and intimidation, the law specifically declares certain acts by an employer to be unfair labor practices. An employer is responsible for the unfair labor practices committed by any person acting directly or indirectly in the interests of the employer, including supervisors, agents, and farm labor contractors engaged by the employer.

Labor Code section 1153(a) provides that it is an unfair labor practice for an employer to interfere with, restrain or coerce agricultural employees in the exercise of their protected rights. Any attempt by the employer to tamper with, control or dominate the free choice of employees as to whether or not of they wish to organize or be represented by a labor organization is a violation of the ALRA and therefore an unfair labor practice. Speeches, leaflets, booklets, or other communications that threaten employees with physical abuse, lay-offs, reduced wages, loss of wages, loss of work, job transfers and the like violate the ALRA because they are threats of force or reprisal.

During an election campaign, granting benefits or promising to raise wages, improve working conditions, make promotions or provide health insurance or other benefits violate the ALRA because they may imply a threat that such benefits would be taken away if a representative is elected, or because they make voting for a representative seem irrelevant or unnecessary.

Here are some examples of employer interference, restraint and coercion. The employer, his or her agents, foremen, supervisors and farm labor contractors may not:

• threaten to fire employees if they organize, vote for, or join a union, or if they engage in activities on behalf the union;

• threaten to harm workers or their property if they join or vote for a union;

• question employees about their union, activities or their support of a union;

• spy on or engage in surveillance of employees, or threaten or appear to do so, while they are engaging in union activities, such as talking to organizers or other workers about a union;

• offer or give employees higher wages, better working conditions, or increased benefits in order to influence workers' votes or support for a union;

• prohibit employees from engaging in union activities during breaks, lunch period, or before or after work, while on the employer's property;

• deny access to union organizers during the time periods established by the Board, or refuse to turn over current lists of employees' names and current residence addresses when requested by the Board;

• intimidate or prohibit employees from wearing union buttons, insignia or other symbols at work;

• in any other way interfere with, coerce or restrain employees in the exercise of their rights under the ALRA.

An employer commits an unfair labor practice by refusing to grant access to union organizers during the time periods established by the ALRB, if such a refusal interferes with employee rights. The employer may not create or control a "company union" or help one labor organization over another by giving money or any other kind of special privilege or support to the preferred organization. An employer or its agents, including supervisors, violates this prohibition by:

• pressuring employees to join a preferred labor organization, except under a lawful union security clause;

• organizing, aiding or supporting a union or committee of employees to represent workers concerning wages, hours and working conditions;

• asking employees or applicants for employment to sign authorization cards;

• giving a preferred labor organization extra time on company property in which to organize employees before an election while denying another organization a similar opportunity; and

• giving special privileges or information to one labor organization which are denied another, except under a lawful collective bargaining agreement.

It is an unfair labor practice under Labor Code section 1153(c) for an employer to discriminate in regard to hiring, or firing, or any term or condition of employment, so as to encourage or discourage membership in any labor organization. Under this section an employer may not treat any employee or potential employee differently because of union affiliation, involvement in union activities or support of any labor organization.

Thus, when an employer conditions hiring or continued employment on the employee's attitude towards unionization or support or activity on behalf of a particular union, the employer has engaged in an unfair labor practice.

An employer who discharges or punishes employees for filing grievances or because of union activity, or otherwise discriminates against employees by requiring them to work apart from other employees, transferring them to lower-paying or less-desirable jobs, or requiring them to use tools or instruments which make their labor more difficult because of their union affiliation or union activity, violates the ALRA because such actions tend to discourage union membership.

It is an unfair labor practice under Labor Code section 1153(d) for an employer to discharge or discriminate against an employee because the employee has filed charges or given testimony under the ALRA. Thus,

an employer may not layoff, suspend, take action against, or in any other way discriminate against an employee because he or she has filed a charge, or a petition, attended or testified in a proceeding involving the ALRB, or given evidence or information in an ALRB investigation.

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Strikes, Picketing and Economic Boycotts

Strikes, picketing, and economic boycotts are permitted under the ALRA, except that under certain circumstances, such activity may constitute unfair labor practices. Labor Code section 1154(d) prohibits strikes, picketing and economic boycotts where an object is to force an employer or self-employed person to join any labor organization or employer organization.

Under section 1154(d), a “secondary boycott” exists when a union engages in, or induces or encourages individuals to engage in, a strike and picketing against a neutral or secondary employer (one with which that union does not have a labor dispute). While a union may picket or strike the primary employer (one with which it has a legitimate labor dispute), a union may not try to force any other employer, person, or manufacturer with whom it does not have a dispute to cease dealing with the primary employer.

The ALRA permits publicity, including picketing, for the purpose of truthfully advising the public and consumers that a product or ingredient of a product is produced by an agricultural employer (the primary employer) with whom the union has a primary dispute and is distributed by another employer (the secondary employer). A union’s picketing of the secondary employer is lawful as long as it does not have an effect of inducing any individual employed by that employer to cease delivering or performing services for the secondary employer and as long as such publicity does not have the effect of asking the public to stop patronizing the secondary employer. However, publicity that includes picketing and has the effect of requesting the public to cease patronizing such other employer shall be permitted only if the labor organization is currently certified as the representative of the primary employer's employees.

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Remedies for Unfair Labor Practices

The ALRB can correct violations that may hinder employee rights to organize, engage in collective bargaining and concerted activities, and vote free from threats, coercion, restraint or interference. A party found to be in violation of the ALRA may be subject to a remedial order issued by the ALRB, providing, for example:

• restoration of employees to the position they would have been in but for the unfair labor practice; for example, making them whole for any pay or other money losses;

• reinstatement and backpay for wrongfully discharged workers;

• posting and reading a notice to workers that explains the party has engaged in an unfair labor practice and listing the specific unlawful activities it engaged in;

• allowing organizers to speak to employees on the employer’s property beyond the usual time restrictions;

• providing bulletin boards of the employer’s property for union communications;

• in cases where but for the bad faith of one party or another a contract would have been reached, the ALRB can make employees whole for the losses they suffered in not having a contract covering them;

• barring a union agent from engaging in organizing activities for one year in a certain region;

• the payment of costs to the charging party for a course of conduct amounting to frivolous litigation.

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Other Employment Considerations

Employee Polygraph (Lie Detector) Tests

The federal Employee Polygraph Protection Act of 1988 generally prevents employers from using lie-detector tests either for pre-employment screening or during the course of employment.

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Sexual Harassment

In recent years some agricultural employers have had to defend themselves against allegations of sexual harassment. Most noteworthy was the case of a Salinas lettuce grower that agreed to pay former employees more than $1.85 million in the biggest settlement of a sexual harassment case filed on behalf of farm workers by the U.S. Equal Employment Opportunity Commission (EEOC).

To help protect themselves, growers should take three actions. These are:

1. Develop and disseminate a company sexual harassment policy.
2. Instruct employees and management personnel (including forepersons and supervisors) about the company's sexual harassment policy.
3. Assign a high-level employee to oversee the sexual harassment policy.

Develop and disseminate a sexual harassment policy: California Government Code section 12950 requires employers to disseminate to its employees a sexual harassment information sheet written by the state Department of Fair Employment and Housing (DFEH) or an equivalent information sheet written by the employer.

The information sheet must state, at a minimum, the following:

- The illegality of sexual harassment
- The definition of sexual harassment under applicable state and federal law
- A description of sexual harassment, using examples
- The internal complaint process of the employer available to the employee
- The legal remedies and complaint process available through DFEH and the Fair Employment and Housing Commission (FEHC)
- Directions on how to contact DFEH and FEHC
- The protection against retaliation for opposing the practices prohibited by law or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, DFEH or FEHC.

Essentially, the information sheet becomes the company's sexual harassment policy.

The law says: "The information sheet or information required to be distributed to employees . . . shall be delivered in a manner that ensures distribution to each employee, such as including the information sheet or information with an employee's pay." The information sheet (company policy on sexual harassment) should be included in the company's employee handbook.

Fortunately, the law states: "[A] claim that the information sheet or information required to be distributed pursuant to this section did not reach a particular individual or individuals shall not in and of itself result in the liability of any employer to any present or former employee or applicant in any action alleging sexual harassment."

However, the law continues: "Conversely, an employer's compliance with this section does not insulate the employer from liability for sexual harassment of any current or former employee or applicant."

The law directs the FEHC to issue to an employer that violates the law's requirements an order requiring the employer to comply with them.

Further, the law requires employers to post the DFEH “no discrimination” poster (DFEH 162) in a prominent and accessible location in the workplace.

On the federal level, the EEOC also enforces prohibitions against sexual and other protected-class-based harassment in employment as well as Title VII of the Civil Rights Act of 1964. An EEOC publication states “[E]mployers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.”

Instruct employees and management personnel about the company’s sexual harassment policy: Employers can be held liable for harassment of other employees by a co-employee, a supervisor and even a non-employee.

There are two types of sexual harassment: “hostile work environment” and “quid pro quo” (“this for that”) harassment.

A hostile work environment interferes with an employee’s work performance or creates an intimidating or offensive work environment. The employer is responsible for acts of non-supervisory sexual harassment where the employer (or its supervisory personnel) knows or should have known of the conduct, unless it can be shown that it took immediate and appropriate corrective action.

Where the harasser is a supervisor, the sexual harassment can take the form of a “quid pro quo” and/or a hostile work environment. In a “quid pro quo” situation, the harassed employee is threatened with a loss of benefits or of her job itself unless the employee complies with the supervisor’s sexual advances.

In Burlington Industries, Inc. v. Ellerth, and Faragher v. City of Boca Raton, the U.S. Supreme Court made clear that employers are subject to vicarious liability for unlawful harassment by supervisors. The standard of liability set forth in these decisions relies on two principles: (1) an employer is responsible for the acts of its supervisors, and (2) employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

To accommodate these principles, the Court held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense. That defense includes two necessary elements: (a) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This is why instruction/training is so important. By training its supervisors and employees about sexual harassment, a company establishes an affirmative defense. The company can then show it took reasonable steps to prohibit sexual harassment and communicated to employees the company’s complaint procedures.

Assign a high-level employee to oversee the sexual harassment policy: Because of the complexities of sexual harassment and expertise involved in investigating complaints, a company should assign a single high-level employee to handle sexual harassment issues for it. This will accomplish two objectives.

First, assuming the company’s policy states that all complaints are to be directed to a specific person, it will eliminate the possibility of an employee discussing a problem with an inexperienced management employee who might overlook the potential severity of the complaint.

Second, the assigned person will be better equipped to document the compliant, conduct the appropriate investigation and recommend the appropriate resolution.

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Employee's Off-Work Activities

The Labor Commissioner has the authority to pursue on behalf of employees claims for loss of wages due to their demotion, suspension, or discharge from employment for lawful conduct occurring during non-working hours away from the employer's premises. (Labor Code section 96, subdivision (k).)

Effective in 2002, an amendment to Labor Code section 98.6 provides that an employee who is discharged or otherwise discriminated against for such conduct is entitled to reinstatement, as well as lost wages and benefits. That amendment conferred those protections beyond just current employees: It provided that applicants refused employment due to lawful off-duty conduct are entitled to employment and reimbursement for lost wages and work benefits.

Section 98.6 does allow certain employment contracts or collective bargaining agreements that protect an employer from conduct that is in “direct conflict” with its “essential enterprise-related interests” and that would actually create a “material and substantial disruption” of its operations. The law protects only employers that incorporate conflict-of-interest policies in employment agreements. Further, the exception encompasses only conflict-of-interest agreements executed by applicants and not those executed by existing employees.

Some off-duty employee conduct, while lawful, is nonetheless extremely harmful to legitimate employer business interests. In agriculture, for example, many crop and livestock operators forbid their employees from producing similar products at home. They do this to help protect the company's own products from infection or disease. At least without entering into a written agreement with newly-hired job applicants, the new law does not allow a farming operation to maintain or enforce this important prohibition since it is lawful for an employee to produce those products during nonworking times away from the employer’s premises.

Further, in every type of business, an employer may be legitimately concerned about avoiding conflicts of interest that would result if its employees were, while remaining in its employ, either to work for its competitors or to set up their own business in direct competition with their employer.

The law does contain language purporting to enable employers to protect their interests. But that language is far too narrow and restrictive to be of much, if any, use to the state’s employers.

First, that language enables employers to protect their interests only as to job applicants.

Second, it requires employers wishing to avail themselves of the limited protection offered by that language to enter into written contracts with job applicants; that is something many employers prefer not to do.

Third, the provision sets such unreasonably high standards of proof that employers could never be confident they had met them.

Employers should carefully review how they will enforce policies prohibiting off-duty conflicts of interest, fraternization, solicitation, and moonlighting to ensure those policies are not in conflict with this law.

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Required Posters, Notices and Disclosures

Many state and federal laws reviewed in this Guide provide that specified information shall be posted or disclosed to employees. Posters and notices must be conspicuously posted where it will be seen and can be read by employees. In some cases additional posting requirements are provided.

Listed below are the posting and disclosure requirements applicable to agricultural employers:

Wages and Hours—Federal

With certain exceptions, employers in interstate commerce must post the poster *Your Rights under the Fair Labor Standards Act* (Publication WH 1088). Agricultural employers should add this text to the “overtime pay” section: *Overtime provisions do not apply to individuals employed in agriculture. FLSA Section 13(b)(12).* The poster, in English and Spanish, can be obtained from the Wage and Hour Division, U.S. Department of Labor.

Wage and Hour Regulation—State IWC Orders

Industrial Welfare Commission (IWC) requires employers to post in an area frequented by employees where it may be easily read during the workday the appropriate IWC order(s) for their industry or employees' occupations. Most agricultural employers must post Order 14 (Agricultural Occupations) plus one of these orders: Order 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations); Order 8 (Handling Products after Harvest): or Order 13 (Preparing Agricultural Products for Market, on the Farm).

Also, IWC Order MW-2001 (Minimum Wage) must also be posted next to each IWC industry or occupational order.

IWC orders may be obtained from the California Department of Industrial Relations and are posted on the IWC's Web site at http://www.dir.ca.gov/IWC/WageOrderIndustries.htm. For more information on IWC orders, see the heading Overtime, page 18, this publication.

Pay Day Notice: Every employer must post a notice stating the regular pay days and time and place of payment set by the employer. Either DLSE 8, available from the Department of Industrial Relations, or a notice stating that information must posted.

Rate of Compensation - State-licensed farm labor contractors must prominently display at the worksite and on all vehicles used to transport employees, the rate of compensation printed in English and Spanish. Labor Code § 1695(7). A poster, DLSE 445, is available from the Department of Industrial Relations, Division of Labor Standards Enforcement.

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Migrant and Seasonal Agricultural Worker Protection Act (MSPA)

Employers employing migrant or seasonal agricultural workers must post or give the following notices:

1. **General MSPA Poster** - explains rights of protected employees. Form WH-1376. See appendix page ?.
2. **Worker Information** - used by employer to disclose employment information at time of recruitment. Form WH-516.
3. **Housing Terms and Conditions** - employers providing housing to migrant employees must post information regarding housing Form WH-521. See appendix page ?.

Employment of Minors

An agricultural employer who employs a parent or guardian of minor children must post the following notice (Education Code §49140):

> "Minor children are not allowed to work on these premises unless legally permitted to do so by law and unless permits to work have been secured by the minor children from duly constituted authorities."
>
> "No se permite que menores de edad trabajen aquí si no están permitidos hacer así por ley y si no han conseguido permisos oficiales para tal trabajo de las autoridades."

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Unemployment and Disability Insurance

1. A poster entitled "Notice to Employees of Unemployment Insurance and Disability Insurance" (Poster No. DE-1857A) may be obtained from the local Employment Tax Office of the Employment Development Department.
2. A written statement relating to filing of claims for benefits under UI and SDI is required when

employees are terminated, laid off or become disabled. The Department has produced two pamphlets to aid in compliance. These pamphlets are: "For Your Benefit, California's Programs for the Unemployed" (DE 2320) and "Disability Insurance" (DE 2515 and DE 2515S - Spanish).

3. Terminated or laid-off employees must be given a reason in writing for their separation. Unemployment Insurance Code §§1085 and 1089.
4. Upon the hiring of an employee, each employer must provide employees information regarding State Disability Insurance. Labor Code § 2613. DE 2515 can be used for this purpose.

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Equal Employment Opportunity is the Law

Federal: The poster ***Equal Employment Opportunity is the Law*** must be posted by employers with 15 or more employees in 20 or more weeks of the current or prior year. This poster includes the poster *Age Discrimination is Against the Law*, which must be posted by employers with 20 or more employees in 20 or more weeks of the current or prior year. It may be obtained from the U.S. Equal Employment Opportunity Commission.

Family and Medical Leave Act (FMLA): Employers with 50 or more employees in 20 or more weeks in the current or prior year must post a notice describing the federal FMLA, under which qualified employees may take up to 12 weeks of unpaid leave each year for the birth or adoption of a child or for the serious health condition of the employee or of the employee's spouse, parent or child.

California Fair Employment and Housing Commission (FEHC)

Regulations of the Fair Employment and Housing Commission (FEHC) require these notices:

1. Pregnancy Disability Leave: Employers with 5 to 49 employees in 20 or more weeks of the current or prior year must post a notice describing the FEHC's requirements for pregnancy-disability leave.
2.. California Family Rights Act (CFRA): Employers with 50 or more employees in 20 or more weeks of the current or prior year must post in a conspicuous place a notice describing the provisions for CFRA leave and for pregnancy-disability leave under the Fair Employment and Housing Act.
3. The poster *Discrimination in Employment is Prohibited by Law* must be posted by employers with 5 or more employees in 20 or more consecutive calendar weeks in the current or prior year. The poster, in English and Spanish, can be obtained from the California Department of Fair Employment and Housing.

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Time Off to Vote

The California Elections Code requires employers to post at least 10 days before each statewide election this notice:

> If a voter does not have sufficient time outside of working hours to vote at a statewide election, the voter may, without loss of pay, take off enough working time which, when added to the voting time available outside of working hours, will enable the voter to vote.
>
> Not more than two hours of the time taken off for voting shall be without loss of pay. The time off for voting shall be only at the beginning or end of the regular working shift, whichever allows the most free time for voting and the least time off from the regular working shift, unless otherwise mutually agreed.
>
> If the employee on the third working day prior to the day of election, knows, or has reason to believe that time off will be necessary to be able to vote on election day, the employee shall give the employer at least two working days notice that time off for voting is desired, in accordance with the provisions of this section.

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Housing and Meals

The California Department of Housing and Community Development (DHCD) requires these notices:

1. Operators of labor camps must post a notice summarizing the legal requirements for labor camps. Poster HCD 206 can be obtained from the DHCD.
2. Amounts charged for meals and lodging must be posted at labor camps.
3. The poster *Fair Housing is the Law* (DFEH164) must be posted at labor camps.

Cal/OSHA

1. A poster in English and Spanish entitled "**Safety and Health Protection on the Job**" describing the Cal/OSHA program may be obtained from the Department of Industrial Relations.
2. Employers subject to **Cal/OSHA's recordkeeping requirements** (i.e., employers with 10 or more employees) must record injuries and illnesses on Cal/OSHA Form 301, or an equivalent form and transfer the information onto Cal/OSHA Form 300 "Log of Work-Related Injuries and Illnesses." Each year Cal/OSHA Form 300A, "Annual Summary of Work-related Injuries and Illnesses" must be posted between February 1 and April 1 which consists of a compilation of Cal/OSHA Form 300. See appendix page ?.
3. Field laborers must be informed of the location of **Field Sanitation Facilities** and of good hygiene practices where 1 or more employees are working. General Industry Safety Order Section 3457.
4. A poster entitled "**Access to Medical and Exposure Records**" must be posted if the employer maintains medical records for employees. General Industry Safety Order § 3204. Form S-11 may be used for this requirement.
5. A poster to notify employees where they can review the **Material Safety Data Sheets (MSDS)** for hazardous substances used in the work place must be posted. General Industry Safety Order §5194.
6. A poster entitled "**Agricultural - Industrial Tractors**" (Form S-504) must be posted at a place frequented by tractor drivers. General Industry Safety Order § 3664(b).
7. A poster entitled "**Operating Rules for Industrial Trucks**" (Form S-503) must be posted at a place frequented by truck or industrial tow tractor drivers. General Industry Order § 3664á).
8. Containers of **Handwashing Water** for agricultural hand laborers must be posted with a sign stating the water is only for handwashing purposes.
9. **Materials Safety Data Sheets (MSDS)** - Each employer of an employee applying or handling a hazardous substance must post or distribute to each such employee "Material Safety Data Sheets (MSDS)." California Administrative Code §2452(j)(9)(A).

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California Safe Drinking Water and Toxic Enforcement Act

California Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): An employer must provide Occupational Exposure warnings to employees if substances identified by the state as causing cancer or birth-related defects are present in the workplace.

Pesticide Postings

Pesticide Postings: The California Department of Pesticide Regulation requires the following postings

1. **Posting of Pesticide Storage Areas**. Signs visible from every direction of probable approach must be posted around all areas where containers that hold, or have held, pesticides required to be labeled with the signal words "warning" or "danger" are stored. Each sign must be big enough to be readable from at least 25 feet away. The notice must be repeated in another appropriate language where it may reasonably be foreseen that persons who do not understand English will come to the enclosure.
2. **Emergency Medical Care**: Where employees apply or handle pesticides, prior arrangements must be made for emergency medical care. A notice must be posted at the work site, or on the application vehicle, of the name, address and telephone number of the physician, clinic, or hospital

providing emergency care.

3. **Emergency Medical Services**: In the case of organophosphates and carbamates, the employer must retain a physician to provide emergency medical services and post the notice described above.
4. **Field Postings**. A property operator must assure that signs are posted around fields to be treated with a pesticide. The signs must be posted before the pesticide is applied, but only if the application is to occur within the next 24 hours. The signs must remain posted and be clearly legible throughout the application and the restricted entry interval (REI). They must be removed within three days after the REI ends and before any entry prohibited during the REI is made.
5. **Irrigation**: Signs must be posted when a pesticide product with the signal word "DANGER" on the label, or a minimal exposure pesticide is being applied to a field through an irrigation system, signs shall be posted.
6. **Fumigants**: Signs must be posted when a fumigant is applied to a field.
7. **Application-Specific Information for Fieldworkers**. The operator of property used for commercial or research production of an agricultural plant commodity must display at a central location application-specific information. The information must be displayed within 24 hours of the completion of an application and include all applications that have been made to any treated field on the agricultural establishment within 1/4 mile of where employees will be working.
8. **Pesticide Safety Information Series A-8**: Before employees may handle pesticides, the employer must display a copy of a completed written Hazard Communication Information for Employees Handling Pesticides (Pesticide Safety Information Series leaflet A-8) at a central location at the workplace. Upon request, the employer must read it to the requesting employee in a language the employee understands.
9. **Pesticide Safety Information Series A-9**: Whenever employees are working as field workers in a treated field, the employer must display at the worksite a copy of a completed written Hazard Communication Information for Employees Working in Fields (Pesticide Safety Information Series leaflet A-9). In the event that fieldworkers gather at a central location before being transported to the worksite, Pesticide Safety Information Series leaflet A-9 may instead be displayed at that central location. Upon request, the employer must read it to the requesting employee in a language the employee understands.

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Workers' Compensation

These notices must be posted:

1. "**Notice of Compensation Carrier**" can be obtained from the employer's workers' compensation carrier. In addition, employers must post: (1) expiration date of policy; (2) local telephone number of Division of Labor Standards Enforcement; (3) name, address and phone number of a local doctor who will handle industrial accidents; and (4) advice as to the injured employee's rights to receive medical care, to select or change the treating physician with proper (i.e., 30-day) advance written notice, and to receive temporary disability indemnity, permanent disability indemnity, vocational rehabilitation services and death benefits. Labor Code §3550.
2. **Off-Duty Recreation**: To limit the employer's liability, a notice should be posted reading substantially as follows: "Your employer or its insurance carrier may not be liable for the payment of workers' compensation benefits for any injury which arises out of an employee's voluntary participation in any off-duty recreational, social, or athletic activity which is not a part of the employee's work-related duties." Labor Code §3600(9).
3. **Written Notice to New Employees**: Also required is a written notice to new employees regarding their right to receive workers' compensation benefits in the event of an injury. This notice must be given either at the time of hire or by the end of the first payroll period. Labor Code §3551.
4. **Notification to Injured Employee**: An employer or insurance carrier must notify an injured employee of the availability of rehabilitation services when the disability exceeds 28 days. A copy of the notification must be forwarded to the State Department of Rehabilitation. Labor Code §6201.

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Employee Polygraph Protection Act

Employers must post a notice informing employees about the Act.

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